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A TREATISE

ON THE

LAW RELATING TO POWERS AND DUTIES

OF

BOARDS OF COMMISSIONERS,

IN THE

STATE OF INDIANA.

WITH PRACTICAL FORMS AND COMMENTS ON THE DIFFERENT PROVISIONS OF THE STATUTE OF INDIANA CONFERRING JURISDICTION ON THE SAME.

BY WILLIAM EGGLESTON.

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PREFACE.

In presenting this work to the public, the author feels that the subject is a matter of very great importance to the people of the State. But having been written in the midst of onerous professional business, he feels fully persuaded that the volume will contain some inaccuracies. Under such circumstances, however, the author is inclined to the opinion that the public will be disposed to give him a generous criticism.

The object of the author in writing this work has not been for the purpose of enlightening the members of the legal profession of the State, but for the purpose of furnishing the Boards of Commissioners throughout the State with a convenient guide for the performance of their official duties. But he thinks it may indeed be to some extent useful to the members of the bar.

WM. EGGLESTON.

Newport, June 17, 1873.

AN ACT providing for the organization of County Boards, and prescribing some of their powers and duties.

[Approved June 17, 1852.]

Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That there shall be organized in each county in this State, a board of commissioners for transacting county business, to consist of three qualified electors, any two of whom shall be competent to do business, to be elected by the qualified electors of the several counties respectively, at the general elections on the second Tuesday in October; and whenever a vacancy occurs in the office of such commissioner before the expiration of the term, the remaining commissioner or commissioners, together with the auditor, shall choose some person to fill such vacancy until the next annual election thereafter: *Provided*, The commissioners now in office shall serve out their terms of office respectively, and until their successors are elected and qualified.

Sec. 2. Each county shall be divided into three districts, and numbered one, two and three, not subject to alteration oftener than every three years; but the districts now formed shall so remain until altered pursuant to the provisions herein contained; but such counties as are not divided into such districts, shall be so laid off by the board of commissioners at their first session after the publication of this act; and one commissioner shall be elected from the residents of each of such districts, by the voters of the whole county; and in any county where there are no commissioners, the auditor thereof shall divide the same into such districts.

Sec. 3. At the first election held to choose the first board of commissioners of any county, the person having the highest number of votes shall continue in office three

years; the next highest, two years; and the next highest thereafter, one year; but if two or more persons have the same number of votes, their terms shall be determined by lot, under the direction of the board of canvassers returning the election; and annually thereafter, one commissioner shall be elected, and shall continue in office three years, and until his successor is elected and qualified.

SEC. 4. Each person elected as such commissioner shall, on receiving a certificate of his election, take the usual oath of office, which being certified on the back of such certificate under the hand and seal of the person administering the same, shall be sufficient authority for such commissioner to act as such.

SEC. 5. Such commissioners shall be considered a body corporate and politic, by the name and style of "the Board of Commissioners of the county of ——," and as such, and in such name, may prosecute and defend suits, and have all other duties, rights and powers incident to corporations, not inconsistent with the provisions of this act.

SEC. 6. Such commissioners shall meet at the Court-House or Auditor's Office in each county on the first Mondays in March, June, September and December in each year, and in counties whose population [is] under ten thousand, such commissioners may sit six days at such term; in counties whose population exceeds ten thousand and is less than thirty thousand they may sit nine days; but in counties whose population exceeds thirty thousand, such commissioners may sit fifteen days if the business of the term requires it. The enumeration to be fixed by the last census of the United States or the latest enumeration by the State.

SEC. 7. The auditor of the county shall attend the meetings of such commissioners, and keep a record of their proceedings, and the sheriff of the county shall also, by himself or deputy, attend and execute their orders.

SEC. 8. When two only of the members shall attend the meeting of the board, and a division shall take place on any question, it shall be continued until the next meeting before it shall be finally determined.

SEC. 9. Such commissioners shall adopt regulations for the transaction of business, and in the trial of causes they shall comply, so far as practicable, with the rules [of] conducting business in the circuit court.

SEC. 10. The commissioners of each county shall have a common seal; and copies of their proceedings, when signed and sealed by the said auditor, shall be sufficient evidence thereof, an the trial of any cause in any of the courts of this State.

SEC. 11. Such commissioners, or the auditor, may administer all oaths necessary to carry into effect the provisions of this act; and they shall have power to preserve order, when sitting as such, to punish contempts by fine not exceeding three dollars, or imprisonment not exceeding twenty-four hours; may enforce obedience to all orders made by them by attachment or other compulsory process; and when fines are assessed by them, execution shall issue therefor, and be collected and paid over as other fines.

SEC. 12. In any county where the county business is done by justices of the peace, they shall continue to act, until the county commissioners shall be chosen and qualfied, and proceedings pending before such board of justices, or before any court in which they are parties, or which has been appealed from their decision, shall proceed to final determination under the authority of such commissioners, if the same be necessary, in their name, and all contracts made by or with such board of justices, or liabilities suffered by, for, or against them in their corporate capacity, shall be of the like effect as for or against such commissioners in their corporate capacity, and for and against such county as if such contracts had been entered into with and by such commissioners.

SEC. 13. Such commissioners in their respective counties shall have power at their meetings:

1. To make orders respecting the property of the county in conformity to law, to sell the public grounds of the county upon which the public buildings are situate, and to purchase in lieu thereof, in the name of the county, other grounds in the county seat on which such buildings

shall be erected; to purchase other lands for the enlargement of the public square, and to take care of and preserve such property

2. To allow all accounts chargeable against such county, not otherwise provided for, and to direct the raising of such sums as may be necessary to defray all county expenses.

3. To audit the the accounts of all officers having the care, management, collection, or disbursement of any money belonging to the county, or appropriated for its benefit, and,

4. To perform all other duties which may be enjoined on them by any law of this State.

SEC. 14. Such commissioners shall cause to be recorded in a book to be kept for that purpose, their proceedings and their determinations touching all matters properly cognizable before them; and all books, accounts, vouchers, papers, and documents, touching the business or property of the county, shall be carefully kept by the auditor, and open to the inspection of any person.

SEC. 15. Such commissioners shall sit with open doors; and where there shall be no court-house, or it shall be unfit or inconvenient, they may hold their meetings in the office of auditor, or in such other building as they may think proper.

SEC. 16. Such commissioners shall cause a court-house, jail, and public offices for the clerk, recorder, treasurer and auditor, to be erected and furnished, where the same has not been done, and shall keep all the public buildings of the county in repair, and such offices, if practicable, shall be made fire proof, and shall be occupied by such officers respectively.

SEC. 17. Whenever it shall be necessary to construct, complete or repair the court-house, jail, or other county building, or whenever it may be desirable to fund or average any existing debt incurred for county purposes, and the revenues afforded by reasonable taxation are insufficient to do the same, the county commissioners may borrow for that purpose any sum of money not exceeding ten thou-

sand dollars, and issue bonds therefor, in amounts of not less than twenty-five dollars each, and bearing a rate of interest not exceeding the legal rate in the State or Territory where the same are negotiated.

SEC. 18. Such bonds may be sold at any place within the United States, but at no greater discount than eight per cent., and shall be in form substantially as follows;

State of Indiana, county of ———: The county of ——— will pay to the bearer —— years from the date hereof, the sum of ——— dollars and —— cents with interest thereon at the rate of —— per cent., payable annually at ———, in the State of ———, on the —— day of ——— in each year.

————————, *Commissioners of County.*

And there shall be attached to each of said bonds the certificate of the auditor of the proper county, in form as follows:

I, ————, county auditor, do certify that the annexed bond was issued to the county treasurer this —— day of —— A. D. In testimony whereof I have hereunto set my hand and fixed the seal of said board of county commissioners this —— day of ———, 18—.

[SEAL.] ————————, *County Auditor.*

SEC. 19. The county auditor shall deliver such bonds to the treasurer of such county, and charge him therewith upon the proper books in his office, and the same shall be deemed as a part of the funds of the county in the hands of the treasurer thereof, who shall be liable therefor upon his official bond as in the case of other funds or securities belonging to the county.

SEC. 20. Such bonds shall be assignable by endorsement thereon, and such endorsement shall vest the property thereof absolutely in each and every endorsee successively.

SEC. 21. Whenever the bonds are sold or negotiated as herein provided, the county commissioners shall make a levy of not less than one-tenth of one per cent. on the taxable property of such county, and cause the same to be placed upon the tax duplicate, properly designated in a separate column for the current and succeeding year; and

such tax, when collected, shall be invested in the bonds aforesaid, or other State and county securities, and thereupon shall constitute a sinking fund for the extinction and ultimate liquidation of the debt created by the issue of such bonds.

SEC. 22. The board of commissioners shall provide by taxation for the annual payment of the interest accruing on all bonds sold, and for that purpose shall make a distinct and specific levy, and cause the same to be placed in a separate column upon the tax duplicate, and such levy, when collected, shall be applied to the payment of the interest as aforesaid, and the balance, if any, to the payment of the principal of such debt, and for no other purpose whatever.

SEC. 23. If such bonds, or any portion of them, shall not be sold as aforesaid, the county treasurer shall return them to the county auditor, who shall give him the proper credit therefor upon his books, and at the next session of the board shall lay such bonds before them. Such board shall cancel or otherwise destroy the same in the presence of such auditor and treasurer, and shall cause an entry of the fact to be made in the order book.

SEC. 24. No allowance shall be made by such commissioners, unless such person [the claimant] shall file with such commissioners a detailed statement of the items, and dates of charge, nor until such competent proof thereof is adduced in favor of such claim, as is required in other courts; but if the truth of such charge is known to such commissioners, it may be allowed without other proof, upon that fact being entered of record in the proceedings about the claim.

SEC. 25. Such commissioners shall annually allow the clerk of the circuit court, sheriff, and auditor, an annual compensation for all extra services, as such, not exceeding one hundred dollars each; but such allowance shall not be made to any such officer, until he shall file a detailed statement of his charge, with items and dates, to the truth of which he shall take and subscribe an oath: which allowance shall be in discharge of all compensation for all extra

and other services where no certain fee is fixed by law.

Sec. 26. In all cases, where lands have been granted to any county for the purpose of a county seat, and town lots have been sold thereof, and the purchase money or any instalment thereof still remains unpaid, all proceedings necessary to be had to recover possession of any such town lot, or to enforce the payment of the purchase money, shall be instituted in the corporate name of the commissioners of the proper county.

Sec. 27. When any claim exists for money advanced by any county officer, for the use or benefit of the county, pursuant to the provisions of law, or of any order of said board, or when there shall be any claim due to any commissioner for locating the seat of justice of any county, such claim shall have preference, and [be] paid by the treasurer out of any money in his hands at the time, or any money which may first come into his hands after the presentment of the order therefor.

Sec. 28. When any judgment has been obtained against commissioners in their corporate capacity, the public property of the county shall be liable therefor; but the court rendering such judgment may, before the issuing of execution, allow such board reasonable time, if the same is necessary, to assess and collect a reasonable amount of revenue to pay and discharge such judgment, in addition to the ordinary expenses of the county.

Sec. 29. The board of county commissioners at their session in June, in every year, shall make a fair and accurate statement of the receipts and expenditures of the preceeding year, and shall cause the same to be posted up at the court-house door, and at two other places in their county, and published in some newspaper of such county, if there be any.

Sec. 30. Such commissioners may exempt from paying poll tax, any person who from any cause they may deem unable to pay it.

Sec. 31. From all decisions of such commissioners there shall be allowed an appeal to the circuit or common pleas court, by any person aggrieved; but if such persor

shall not be a party to the proceeding such appeal shall not be allowed, unless he shall file in the office of the county auditor his affidavit setting forth that he has an interest in the matter decided, and that he is aggrieved by such decision, alleging explicitly the nature of his interest.

SEC. 32. Such appeal shall be taken within thirty days after the time such decision was made, by the appellant filing with the county auditor a bond with sufficient penalty and sureties, to be approved by said auditor, with condition for the due prosecution of such appeal, and the payment of all costs, if the same shall be adjudged against said appellant.

SEC. 33. Within twenty days after the filing of such appeal bond, the auditor shall make out a complete transcript of the proceedings of said board, relating to the proceeding appealed from, and shall deliver the same, and all the papers and documents filed in such proceeding, and the appeal bond, to the clerk of the court to which such appeal is taken.

SEC. 34. When such appeal is taken by a person not a party to the proceeding, or when such appeal is taken in vacation, the appellant, if there be an appellee, shall cause a summons to be sued out of the clerk's office of the court to which the appeal is taken, returnable on the first day of any term of such court next after the date thereof, requiring the appellee to appear and answer said appeal, which summons shall be issued and served as other similar process.

SEC. 35. If such appeal shall be filed, and such summons, when necessary, served ten days before the first day of the court next after such appeal, such cause shall stand for trial at such term; otherwise it shall be continued until the next term of the court.

SEC. 36. All appeals thus taken to the circuit or common pleas court shall be docketed among the other causes pending therein, and the same shall be heard, tried and determined as an original cause.

SEC. 37. Such court may make a final determination of the proceeding thus appealed, and cause the same to be executed or may send the same down to such board, with an

order how to proceed, and may require such board to comply with the final determination made by such court in the premises.

AN ACT providing for calling special sessions of Boards of County Commissioners.

[Approved March 7, 1863.]

Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That special sessions of the board of county commissioners of the several counties in this State, may be called whenever the public interests require it, first, by the county auditor; secondly by the clerk of the circuit court, in case of the death or disqualification of the county auditor; thirdly, by the recorder of the proper county, in case of the disqualification from any cause, of both the auditor and clerk of the circuit court.

Sec. 2. At least six days notice of such special session shall be given, unless in the opinion of the officer calling the same, an emergency exists requiring a shorter notice; in that case the officer may fix the time at his discretion.

Sec. 3. Special sessions of boards of commissioners called in pursuance of this act, shall be governed by the laws now in force regulating the proceeding and defining the powers of county commissioners at special sessions.

CHAPTER I.

The Board of Commissioners, their election and organization.

The word commissioner is derived from the Latin word *commissio*, and means a person to whom a commission is directed authorizing the performance of certain specified act. And the Legislature of Indiana in establishing the Board of County Commissioners in each county throughout the State evidently adopted that definition, as the different Boards in this State only possess certain specified powers.

The act approved June 17, 1852, provides that each county in this State shall be divided into three districts, to be numbered one, two and three. The divisions were to be made by the different county boards that were organized under the act of 1843, and were in existence at the time the act of 1852 took effect. It provides that where there were no regular organized boards in existence in any of the counties of this State, at the time this act took effect, that the county auditors of such county or counties should make such division.(4)

Each of these districts is entitled to one commissioner to be elected by the qualified voters of the entire county. The object of these divisions was evidently to have each particular locality and community throughout each county represented by a man who is acquainted with the wants of the people in his district. By adopting this method the wants of the people of the whole county are kept constantly before the board.

This act provides that at the next annual election after the act of 1852 took effect, each county should elect three commissioners, one from each district. The candidate who received the highest number of votes to hold his office for

(1) 1 Res. by G. & H., p. 247.

(4) 1 Res. by G. & H., p. 247.

the term of three years; the one receiving the next highest for the term of two years, and the third highest for the term of one year. But commissioners elected at any succeeding election were to hold their office for the term of three years.(1) So that under this act there is one commissioner that is elected or takes his office annually. The obvious intention of our legislature in making this provision in the law was in order that no county should at any time be under the control of inexperienced men. Under this wise provision the majority of the board is always composed of men who have had, at least, one year's practical experience in the business pertaining to their office.

ELIGIBILITY.

In order to be eligible to the office of commissioner, the candidate must be a white male over the age of twenty-one years; he must have resided in the county for a period of one year before his election. He must also, at the time he is elected, be a resident of the district he intends to represent.(5) But after he is elected and qualified, and enters upon the duties of his office he can remove from one district to another of the same county and still hold his office.(6)

What it takes to constitute residence has been a question of dispute among jurists for centuries. It has received the attention of many of the higher courts of this and other countries but has never yet been settled beyond controversy. The general definition is, that the party must have taken up his abode at a particular place with the intention of permanently remaining there. Our Supreme Court, in the case of McConnel vs. White, defines residence to be the living in a given place with the intention of making it one's home.(7) For further information in relation to this vexed question, the reader is referred to our notes.

NOTES.

1. The domicile of a man's birth is presumed to continue until he has selected another, but it is admitted that he can choose another domicile, and that

(5) Article —, Sec. 4, Constitution of Indiana. (6) 24 Ind., 101. (7) 23 Ind. 43.

he is not tied down to that of his birth. The evidence of such change of domicil is not well defined. No precise time of residence at his new selection has been prescribed as necessary to constitute it his domicile. If he has selected his new home with intention of remaining, this would seem on authority to be sufficient if he is actually at his new home. Russell vs. Randolph, 3 Amer. Law Reg. p. 560.

2. To gain a domicile, or residence, in this State, the citizens of another State must remove, locate, and intend permanently to remain here; residences without such intention operates no change of political rights, and such resident cannot vote in this State. Thus, also, a resident in a county for any length of time on business, on a visit for pleasure, or for any temporary purpose, with intention to return to a domicile elsewhere, or with intention to remain for an indefinite time at least, is no abandonment of the former domicile, and gives no domicile in the county where such temporary sojourning is made, and consequently no right to vote at such temporary residence. French vs. Light, 4 Ind. 475, notes.

3. A single man can be no more without a fixed domicile than a man of a family, and though the domicile of the former may be more difficult to find and prove, yet the rules of evidence by which it is ascertained are the same as those applied to the domicile of other persons. *Ib.*

4. Upon a question of domicile, evidence of the conduct or declaration of the party afterwards as well as before may be received to ascertain his intention on a particular day. The word home is nearly synonymous with the word domicile. A residence within the meaning of our constitution is home. The best definition of a domicile seems to be, resident at a particular place, accompanied with positive or presumptive proof of an intention to remain for an unlimited time. But the intention to acquire a domicile in any place is not sufficient without removal and location in that place. Domicile is acquired instantaneously upon removal and location *animo manedi*, or with intention of staying. If a person has actually removed to another place with an intention of remaining there for an indefinite period, and is at a place of fixed present domicile, it is to be deemed his fixed domicile, notwithstanding he may entertain a floating notion to return at some future time. But the act and intention must be united and complete. And the party's declarations coupled with his acts furnish the evidence of his intention. 9 Ind. 477 notes.

5. With regard to facts of intention, lapse or length of time, as proving the place of residence, the true principle on a view of the whole matter is, that length of time alone will not make the change from the old to the new residence; intention alone will not do it; but the two taken together do constitute a change of domicile. Still a person by a very long residence in a place may, perhaps, by residence alone give such clear evidence of his intention to abandon his former domicile as that the law will hardly receive any other evidence, such as his declaration to countervail it. 35 English Law and Equity, p. 540–2.

6. And in case of doubtful domicile, residence, and especially very long continued, is a controling circumstance. Emries vs. Smith, 14 Howard U. S. R., p. 423.

7. Of the few principles that can be laid down generally, I hold that time is

the grand ingredient in constituting domicile. I think hardly enough is attributed to its effects, in most cases unavoidably conclusive. It is not unfrequently said that if a person comes only for a special purpose, that he shall not fix a domicile. This is not to be taken in an unqualified latitude and without some respect had to the time which such person may or shall occupy; for if the purpose be of a nature that may probably, or does actually detain the person for a great length of time, I cannot but think that a general residence might grow on a special purpose. A special purpose may lead a man to a country where it shall detain him the whole of his life. I cannot but think against such a long residence the plea of an original special purpose could not be raised. It must be inferred in such cases that other purposes forced themselves upon him and mixed themselves into his original design, and impressed upon him the character of the country where he resides. 2 Robeson's Admiralty Report, Ant ad p. 1801.

8. A person's place of residence as a criterian of domicile, it may be remarked that a man's dwelling house is first regarded in contradistinction to his place of business, trade or occupation. Abington vs. North Bridgewater, Pickering (Mass.) p. 170–8.

After a commissioner has been elected, the clerk of the circuit court of his county must, after the expiration of ten, and within 20 days (if the election is not contested) from the time the board of canvassers have made their return, make out and deliver on demand of such commissioner, a certificate of his election.(10) After he recieves his commission he must present the same to the county auditor of his county, and take the necessary oath as required by section 4, article 15 of the constitution of Indiana,(*a*) which oath must be endorsed on the back of his commission.

The oath may be in the following form:

STATE OF INDIANA, } ss:
————County, }

I, John Smith, do solemnly swear (or affirm) that I will support the constitution of the United States, and of the State of Indiana, and well and faithfully discharge the duty of Commissioner of ———— county, Indiana according to to law, so help me God.

JOHN SMITH.

Subscribed and sworn to before me, this —— day ————, A. D. 187—

In witness whereof I have hereunto set my hand and official seal.

[SEAL.] THOMAS BROWN, Auditor.

The commissioners are not required to give bond; there-

(10) 1 Res. by G. & H., p. 312, sec. 38. (11) 1 Res. by G. & H., p. 248, sec. 4.

(*a*) 1 Res, by G. & H., p. 54.

fore, as soon as they take the required oath, they are qualified to enter upon the duties of their office.

VACANCY—HOW FILLED.

Whenever a vacancy occurs in the office of commissioner, either by death, removal from the county, or by any other cause, before the expiration of the term, the remaining commissioner, or commissioners, together with the auditor, shall choose some person to fill such vacancy until the next election thereafter. In order to do this the commissioner or commissioners and the auditor should meet and select a suitable man from the same district from which the vacancy occurred.

They must enter their proceeding of record, have the auditor to certify the appointment to the clerk of the circuit court, who must commission the appointee at once, who after taking the oath required by law can enter upon his duties as such commissioner.(5)

As a general rule the appointee will hold his office until the next election, but to this rule there are some exceptions. If the vacancy is produced by sickness, insanity, or any other temporary cause, the appointee will hold his office until the disability is removed.(6) A commissioner will hold his office until his successor is elected and qualified.(7)

CHAPTER II.

Their Election—How Contested.

The different boards of county commissioners throughout the State have original exclusive jurisdiction in all contested election cases, except State officers. The contest for the office of judge of the circuit and common pleas court, and of the prosecuting and district attorneys, and all other district offices, must be brought before the Board of Commissioners of the county giving the largest number of votes for such office.(12)

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(5) 1 Res. by G. &. H., p. 247, sec. 1. (6) 8 Blackford, p. 132. (7) Sec. 3, Art. 15 Constitution of Indiana. Akers vs. State, 8 Ind. 484. (12) There is a typographical error in Sec. 16 of the act approved May 4, 1852; the word *no* before "contest," in the second line of said section, should be *all*, and is so in the copy filed with the Secretary of State.

The contest for all county and township offices must be brought in the proper county, or in the county where the election for such offices took place.(13)

In our remarks upon the practice and law governing trials in contested election cases, we shall confine ourselves to the office of commissioner, but as all contested election cases are governed by the same rules of law and practice, what we shall say with reference to commissioners will be applicable to all contested election cases.

Any legal voter may contest the election of any officer. To do so he must, within ten days after the board of canvassers have met and declared such person elected, file with the auditor of the proper county a written statement, specifying the ground of contest, which statement must be verified by the affidavit of such elector.

The election may be contested for any of the following reasons:

1. For the malconduct of any member or officer of the proper board of judges or canvassers.
2. When the contestee was inelligible.
3. When the contestee, previous to such election, shall have been convicted of infamous crime, such conviction not having been removed, nor such person pardoned at the time of his election.
4. On account of illegal votes.

But no illegality or malconduct of any member or officer of the board of judges or canvassers shall set aside the election of any person, unless such irregularity or malconduct was such as to cause the contestee to be declared elected when he had not received the highest number of legal votes. Nor shall the election be set aside for illegal votes unless the number thereof given to the contestee, if taken from him, would reduce the number of legal votes below the number of legal votes given to some other person for the same office.(5)

Any elector who wishes to contest the election of any officer must make out his statement in a plain, concise man-

(5) 1 Res. by G. & H., p. 318.

ner, without repetition, and in such a manner as to enable a person of common understanding to know what is intended,(6) take it to the proper county auditor's office and file it with the auditor, and have the same marked filed by the auditor. Merely leaving a paper in the auditor's office is not filing it.(7) The petition or written statement may be in the following form:

FORM NO. 1.

STATE OF INDIANA, ———— County. } ss:

Before the Board of Commissioners of ———— County.

JOHN SMITH *vs.* RICHARD ROE.

To the Honorable Board of Commis'ers of the County of ——:

John Smith would represent to your honors that he is over the age of twenty-one years; that he has been a *bona fide* resident of the county and State aforesaid for a period of ten years. And he would further represent to your honorable body that at the October election for the year 1870, this complainant and one Richard Roe were opposing candidates for the office of County Commissioner from the third district of ———— county, and that this complainant was a legal voter at said election and entitled to vote for himself or for the said Richard Roe; that there were no other candidates in said district for said office at said election, and that all the votes cast in the aforesaid county at said election for commissioner for the third district aforesaid were cast for this complainant and the said Richard Roe. That said Richard Roe received fourteen hundred and fifty votes, and this complainant fourteen hundred and twenty-five votes. That the said Richard Roe was on —— day of October, 1870, declared by the Board of Canvassers of said county duly elected commissioner from the third district of said county of ————, Indiana. This complainant says that the said Richard Roe was not duly and

(6) 2 Res. by G. & H., p. 70. (7) 2 Ind. 91. 6 Ind. 309.

legally elected to the said office of commissioner from the third district of said county, but that this complainant was legally elected to said office by the qualified electors of said county. He therefore files this petition to contest the election of the said Richard Roe, for the following reasons:

1. That there were cast for the said Richard Roe, at said election for said office of commissioner, from the third district of said county, and counted to him, forty illegal votes, cast by persons under the age of twenty-one years; and twenty-five illegal votes were cast and counted to the said Richard Roe for said office by non-residents of the State of Indiana. That all the illegal votes that were cast at said election for the said Richard Roe for commissioner aforesaid were cast at the Union precinct, in Helt township in said county, and at Newport precinct, in Vermillion township, in said county. That the names of the persons who cast said illegal votes are unknown to your petitioner.

Your complainant therefore asks this honorable board to make inquiry into the facts set forth in this complaint, and after due investigation they find that the allegations aforesaid are true, that your honorable body declare this complainant the duly elected candidate for the office of commissioner from the third district of said county, and so certify your finding to the Clerk of the Circuit Court of said county, and for all other proper relief.(8)

JOHN SMITH.

John Smith, being duly sworn upon his oath says that the foregoing statement and ground for contesting the said election of the said Richard Roe to the office of commissioner for the third district of ——— county, Indiana, are true in substance and matter of fact, as he is informed and verily believes. JOHN SMITH.

Subscribed and sworn to before me this 15th day of October, 1870.

[SEAL.] JOHN SHORT, Auditor.(7)

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(8) Wheat vs. Ragsdale, 27 Ind. 191. (7) Curry vs. Baker, Governor, 31 Ind. 151.

If the ground of contest is malconduct of any of the board of judges or commissioners, the following form may be used:

FORM NO. 2.

STATE OF INDIANA, }
——— County, } ss:

Before the Board of Commissioners of ——— County.

JOHN SMITH *vs* RICHARD ROE.

To the Honorable Board of Commis'ers of the County of——.

Your petitioner would represent to your honors that he is over the age of twenty-one years; that he has been a *bona fide* resident of the county and State aforesaid for a period of ten years. And he would further represent to your honors that at the October election for the year 1870, this complainant and one Richard Roe were opposing candidates for the office of County Commissioner from the third district of ——— county, and that this complainant was a legal voter at said election and entitled to vote for himself or for the said Richard Roe, and that there were no other candidates for said office. That the Board of Canvassers met on —— day of ———, 1870, and found that the said Richard Roe had counted to him, by the Inspectors and Judges of the different election precincts throughout the county aforesaid, fourteen hundred and fifty votes, and your complainant fourteen hundred and twenty-five votes; they therefore declared that said Richard Roe was duly elected commissioner from the third district of said county. But your petitioner avers that said Richard Roe was not duly and legally elected commissioner from the third district of ——— county, but that your complainant was duly and legally elected to said office by the qualified voters of said county. He therefore files this petition to contest the election of the said Richard Roe to the said office for the following reasons:

1. For malconduct of Seth Thomas, Inspector of the

Union precinct, in Helt township, in said county, in this, to-wit: That the said Seth Thomas, inspector as aforesaid, did corruptly, unlawfully and fraudulently take out of the box in which the ballots were cast at said election precinct one hundred and fifty legal ballots deposited by legal electors at said election, and before the same were counted, having on them the name of your complainant for the said office of commissioner for the third district of said county, and destroyed them, and put into said ballot box in lieu thereof one hundred and fifty ballots or tickets having thereon the name of the said Richard Roe as a candidate for commissioner aforesaid, which fraudulent tickets so put in by said Seth Thomas aforesaid were by the Board of Inspection at the Union precinct aforesaid, and also by the Board of Canvassers, counted as legal votes cast for the said Richard Roe. Your complainant therefore asks your honors to inquire into the facts set forth in this petition, and if you find they are true that you declare this complainant duly elected commissioner from the third district of said county, and that you certify your finding to the Clerk of the Circuit Court of said county.

John Smith being duly sworn, upon his, &c., as in No. 1.(*b*)

9. On filing your complaint or written statement with the auditor the law makes it his immediate duty to notify the Clerk of the Circuit Court, in writing, that the election of such officer is contested, and on receipt of this notice the clerk must withhold the commission until the question is finally determined.(*d*) The notice to the clerk may be in the following form:

STATE OF INDIANA, }
——— County, } ss:

To John Jones, clerk of the circuit court within and for the county and State aforesaid: You will take notice that on the —— day of October, 1870, John Smith filed in my office his written statement to contest the election of Richard Roe to the office of commissioner in and for the third

(*b*) 31 Ind. 151. 27 Ind. 191. (*d*) 1 Res. G. & H., p. 318, sec. 17. 1 Res. G. & H., p. 318, sec. 38.

district of ——— county, Indiana, and that I have notified the board of county commissioners to meet at the court-house in special session, on the —— day of October, 1870, at which time said contest will be determined.

In witness whereof, I have hereunto set my hand and affixed my official seal, this —— day of October, 1870.

[SEAL.] JOHN SHORT, Auditor.

On the filing of the petition the auditor must issue notice to each member constituting the board of County commissioners to meet at the court-house on a day to be designated by him, not less than ten nor more than twenty days from the time of filing the petition, or written statement, in his office, to meet in special session for the purpose of trying said contest. He must also issue a summons to the contestee to appear at the time set for trial, to which summons there must be attached a copy of the written statement filed by the contestor. The notice to the commissioners and the summons to the contestee with the copy of the written statement should be delivered to the sheriff of the proper county by the auditor. The sheriff must, within five days after receiving said papers, serve the same on the contestee by delivering him a copy of such notice and written statement, or by leaving a copy thereof at his last usual place of residence.(10) The notice to the commissioners may be in the following form:

STATE OF INDIANA, }
——— County, } ss:

To the sheriff of ——— county: You are hereby commanded to notify A, B and C, who now constitute the board of commissioners of said county, to appear and be at the court-house in ———, at nine o'clock A. M., on the —— day of October, 1870, to hold a special session of said board for the purpose of trying the case of John Smith vs. Richard Roe, in which the said John is contesting the election of the said Richard Roe, to the office of commissioner for the third district of ——— county, and of this

(10) 1 Res. by G. & H., p. 319, sec. 19.

writ make due return. Given under my hand and seal, this —— day of October, A. D. 1870.

[SEAL.] JOHN SHORT, Auditor.

The summons to the contestee may be in the following form:

STATE OF INDIANA, }
——— County, } ss:

To the sheriff of ——— county: You are hereby commanded to notify Richard Roe to appear before the board of commissioners at the court-house in ———, on the —— day of October, 1870, at nine o'clock, A. M., to answer the charge of John Smith, in which he contests the election of the said Richard Roe to the office of commissioner from the third district of ——— county, to which office the board of canvassers of said county declared the said Richard Roe duly elected on the —— day of October, 1870. And you are further commanded to leave with the said Richard Roe a copy of the written statement of the said John Smith, which is hereto attached, at the time of the service of this summons, and of this writ make due return.

[SEAL.] JOHN SHORT, Auditor.

After the sheriff has served his writ as required by law, he must make due returns of his proceedings to the proper auditor. His return should be a concise history of his proceeding under the writ; it must be indorsed on the back of the writ, or on a paper attached to the writ. It is the duty of the auditor to issue subpœnas for witnesses at the request of either party.(*a*) The subpœna for witness must be directed to the sheriff of the county. The following form may be used:

STATE OF INDIANA, }
——— County, } ss:

To the sheriff of said county: You are hereby commanded to subpœna William Styles and John Hunt to appear before the board of commissioners of the county of ———, at the court-house, on the —— day of October,

(*a*) 1 Res. by G. & H., p. 319, sec. 19.

A. D. 1870, to testify in an action wherein John Smith is plaintiff and Richard Roe is defendant, on behalf of the plaintiff, and of this subpœna make due return. This —— day of October, A. D. 1870.

JOHN SHORT, Auditor.

At the time set for trial the board meets, and if the parties appear they proceed with the trial; and the rules of law obtaining in the circuit courts throughout the State must govern the board in the trial. They must try and determine the contest, as the law makes no provision for a jury trial in such cases. They have power to compel the attendance of witnesses, to swear and examine the same, to punish contempts as other courts, to adjourn or continue the trial from time to time not exceeding twenty days, to make the necessary orders for the payment of costs, and to coerce the payment of the same.(*c*)

If, on the calling of the case, the plaintiff appears but the defendant does not, and if it appears from the return of the sheriff that the defendant has been served with legal process more than ten days before the time set for trial,(*d*) the board must have the defendant called three times by the sheriff and defaulted. After which the plaintiff, or contestor should be required to introduce evidence to establish the allegation in his complaint, or written statement, and if the board is satisfied from the evidence that the allegations set forth in his complaint are true, they should so find, and enter their finding of record, as required by law. But if the defendant appears at the time and place set for trial, he must enter an appearance to the cause. This he can do only by plea, motion, entry on the record, or some other official acts.(5) The appearance may be special or general. A special appearance is made for a certain purpose only, and does not extend to all the purposes of the suit; a special appearance under our practice is generally made for the purpose of making preliminary objections, for defects in the process, etc. A general appearance is a simple and absolute submission to the juris-

(*c*) 1 G. & H., p. 319. (*d*) 1 Res. G. & H., p. 319. (5) 3 Blackford, 325.

diction of the court. A general appearance waives all defects in the process or in publication.(13) If there are any irregularities in the notice or summons, the contestee should make a special appearance and move to quash the same.(14) If there is a defective service, move to set the service aside.(15) A special appearance for the purpose of making preliminary objections to the process does not cure defects in the process.(16) If there are no irregularities in the process or defects in the service, the defendant should enter a full appearance at once; and on entering an appearance the board should enter an order of record for him to answer at a certain specified hour on that day or on some other day, to be designated in the order of the board. In making the order for the defendant to answer, the board should take into consideration all the circumstances surrounding the case, and give such time as in their judgment will be sufficient to enable the contestee to prepare his answer. At the time fixed for the defendant or contestee to answer, the board must see that their order is complied with, and the rule discharged. If the defendant or contestee fails to answer, the duty of the board is clearly marked out by the statute, which provides that, "If from any cause, either party shall fail to plead, or make up issues within the time prescribed, the court shall enter judgment as upon default, unless for good cause shown, further time be given for pleading, on payment of the costs occasioned by the delay."(17) The defendant may discharge the rule by showing that there is a defect in the plaintiff's or contestor's complaint, or written statement, which will be an excuse for not answering, as he is not bound to answer a bad complaint. The objection to the defects in the

(13) 19 Ind. 404, 3 Blackford 207, 8 Blackford 58. (14) 12 Ind. 257. (15) 2 Ind. 54, 9 Ind. 6, 12 Ind. 257, 1 B. & P. 250, 15 Ind. 374, 19 Ind. 304, 13 Ind. 490, 10 Ind. 380, 19 Ind. 404, 3 Scam. 48, 2 Scam. 462, 25 Ills. 107. (16) 3 Ind. 194, 5 Black. 212, 2 Ind. 289, 7 Ind. 447, 12 Ind. 70. (17) 2 Res. by G. & H. p. 95, sec. 59, 9 Ind. 236, *id.* 357, *id.* 544. The cause was docketed for trial on the 5th day of the term. At the calling of the docket for issue on the second day, a rule was taken to plead on the third day, and upon failure to plead the defendant was defaulted, and judgment rendered against him held no error. 9 Ind. 236.

complaint may be raised in different ways, but the most usual way is by

DEMURRER.

Section 50 of the statute provides that the defendant may demur to the complaint when it appears upon the face thereof either—

1. That the court has no jurisdiction of the person of the defendant or the subject of the action.
2. That the plaintiff has no legal capacity to sue.
3. That there is another action pending between the same parties for the same cause.
4. That there is a defect of parties plaintiff or defendant.
5. That the complaint does not state facts sufficient to constitute a cause of action.
6. That several causes of action have been improperly united.(18)

It is to be observed that in order to enable the contestee to avail himself of the objection by demurrer, the defect must appear upon the face of the plaintiff's or contestor's written statement or complaint.(19) All defects not apparent on the face of the pleadings must be taken advantage of by motion or answer. Our practice act provides that "when any of the matters enumerated in section fifty do not appear upon the face of the complaint, the objection (except for misjoinder of causes) may be taken by answer; if no such objection is taken either by demurrer or answer the defendant shall be deemed to have waived the same except only the objection to the jurisdiction of the court over the subject of the action, and except the objection that the complaint does not state facts sufficient to constitute a cause of action.(20)

The statute causes of demurrer are six in number. And the statute provides that "for no other cause shall a demur-

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(18) 2 Res. by G. & H., pp. 77, 78, 79 and 80. (19) Hurt vs. Conn, 12 Ind. 257. A demurrer only reaches such defects as are apparent on the face of the pleadings to which it is directed. Jones vs. Bradford et al., 25 Ind. 305. (20) 2 Res. by G. & H., p. 81.

rer be sustained; and unless the demurrer shall distinctly specify and number the grounds of objection to the complaint it shall be overruled.(21) The demurrer may be for one or all the statutory causes, at the option of the party demurring. But in cases where one has doubt as to which objection he should make by demurrer, he had better adopt the safer rule and assign both objections. The demurrer need not be in the exact language of the statute, but if it points out substantially any one of the six defects mentioned in section fifty, *supra*, it will be sufficient. To illustrate the fifth subdivision of section fifty, say that the defendant may demur when the complaint does not state facts sufficient to constitute a cause of action, and when that statement is omitted and the demurrer proceeds to point out a fact necessary to constitute a cause of action which is not alleged in the complaint, it would be pointing out the objection in a different way, but would be substantially the same thing and would be good as far as it reached; it would be more specific and would not cover any other objection, save the one specifically pointed out, although there be a want of other necessary facts which might be reached if the language of the statute had been employed.(22) But a demurrer must include, in terms or in substance, some one of the statutory causes of demurrer, if it does not it should be overruled.(23)

Our Supreme Court, in the case of Kemp vs. Mitchell and another, where the following causes were assigned in the demurrer—1. "That the Circuit Court had no jurisdiction;" 2. "That the same is not sufficient in law to entitle the plaintiff to the relief demanded,"—held that the second cause of demurrer raised no question whatever for the consideration of the court, as such a cause for demurrer was unknown to our laws, and that a demurrer assigning only such an objection should be overruled.(24)

And in the case of the Cincinnati and Chicago Railway Company vs. Washburn, the same court held that a demur-

(21) 2 G. & H., p. 81. (22) The State on the relation of Robinson vs. Leach and others, 10 Ind. 308, 9 Ind. 359. (23) Lane vs. The State, 7 Ind. 426. (24) 29 Ind. 163,

rer for the cause "*that the facts alleged* did not entitle the plaintiff to the *relief demanded*," that the statute did not warrant a demurrer for that cause, and expressly requires such a one to be overruled.(25)

But in the case Pace vs. Oppenheimer, the same court held that a demurrer assigning the cause, "*that the complaint does not contain facts enough to entitle the plaintiff to relief*," was substantially good, and came under the fifth subdivision of section 50.(26)

Remarks on Subdivision First. *That the Court has no jurisdiction of the person of the defendant.* The word jurisdiction, as used in this section, means "the authority by which a judicial officer takes cognizance of, and decides causes;" or "the power to hear and determine a cause." The jurisdiction of the person of the defendant means, to have authority to bind the defendant by a judgment. The board of commissioners is a county court, whose jurisdiction is limited generally by the bounds of the county; and they have no jurisdiction of the person of a defendant out of the county, unless by some special statutory provision. Therefore, the first cause assigned for demurrer under subdivision first, will seldom occur in their court. But it may sometimes occur under section 16 of the act providing for the contesting of elections, etc. That section provides, "that all contests for district and circuit officers shall be commenced and tried in the county giving the largest vote for such officer." If a suit to contest the election of one of the officers in any other county save the one giving the highest number of votes for such officer, the board would have no jurisdiction of the person of the defendant, and if this fact appeared upon the face of the written statement, or the plaintiff's complaint, the defendant may demur for the want of jurisdiction over the person of the defendant. (27) But jurisdiction of the person of the defendant may be waived by the act of the party.(28) If the defendant sued in the wrong county appears and goes to trial without

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(25) 25 Ind. 259. (27) 5 Blackf. 546. Bicknell's Civil Practice p. 45. 16 Ind. 401. (28) 5 Blackf. 546.

making objection on that account, he waives the defect(29) as to jurisdiction of the court over his person.

The court has no jurisdiction of the subject of the action.

The subject of the action, as used in this section, means the subject matter of the action, which means the question present for the consideration of the court.(30) If it appears upon the face of the pleading that the court has no jurisdiction of the subject of the action, this will be a good ground of demurrer. The jurisdiction of the subject matter of the action can never be conferred by the acts of the parties.(31)

Remarks on Subdivision Second. *That the plaintiff has no legal capacity to sue.* This means that the plaintiff is not entitled to sue by reason of some personal disability. If it appears upon the face of the complaint that the plaintiff is an infant, a married woman, or an insane person, or an idiot, the defendant can demur for the reason that the plaintiff has no legal capacity to sue. It is provided by section 1 of the act governing contested elections, that the election of any person declared elected by popular vote to any office, may be contested by any elector who was entitled to vote for such person. And if the contestor's written statements or complaint fails to show that the (contestor) plaintiff was a legal voter, and entitled to vote for the contestee, this will be a good cause for demurrer under the second division of section 50, *supra.*

Remarks on Subdivision Third. *That there is another action pending between the same parties for the same cause.*

If this defect appears upon the plaintiff's complaint it will be a cause of demurrer; otherwise, the objection must

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1. The capacity of a plaintiff to sue is independent of the cause of action, the facts showing the former are not facts constituting the cause of action.—Bank of Louisville vs. Edwards, 11 Howard, 216.

2. The legal capacity of the plaintiff to sue is reached by demurrer, if it appears on the face of the complaint; if it does not so appear, then by answer. —Hollingsworth vs. the State, 8 Ind. 257.

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(29) 5 Blackf. 546, 17 Ind. 135, *id.* 325, 22 Ind. 163, 21 Ind. 321. (30) 17 Ind. 135, Vansantwood's Pleadings p. 660. (31) 17 Ind. 135. (32) Story E. P. S. 494.

be taken by answer, or it will be deemed to be waived. This cause for demurrer seldom occurs in court if there is another action pending between the parties for the same cause this rarely occurs on the face of the pleadings. In order to take advantage of this defect by demurrer, the complaint must disclose this fact on its face, and that the action is pending in some competent court of this State.

If the complaint shows that there is another action pending between the parties for the same cause in the court of some other state, this would not be a good cause for demurrer.(33)

Remarks on Subdivision Fourth.—*That there is a defect of parties, plaintiffs or defendants.*

It is provided by section seventeen of the code that "all persons having an interest in the subject of the action, and in obtaining the relief demanded, shall be joined as plaintiffs, except as otherwise provided in this chapter." Section eighteen provides "that any person may be made a defendant who has or claims any interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved." Section nineteen provides "that of the parties in the action those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have joined as plaintiff can not be obtained, he may be made a defendant, the reason thereof being stated in the complaint.(34)

It seems that under these sections that all persons having an interest in the subject of the action and in obtaining the relief demanded, should be made plaintiffs; but if any one having such an interest refuses to join as plaintiff in the action, then he must be made defendant. That all persons who have or claim any interest in the controversy adverse

(33) 12 Ind. 607, 14 Ind. 385. The objection of a former action pending cannot be raised upon a demurrer assigning for cause want of sufficient facts, but is itself a distinct cause of demurrer, and such objection cannot be made for the first time in this court. 21 Ind. 137. (34) 2 Res. by G. & H. pp. 46, 47, 48, sec. 17, 18, 19.

to the plaintiff, or who is a necessary party to the complete determination or settlement of the question involved should be made defendant. If any of the parties required by these sections be omitted, and that fact appears upon the face of the complaint, the defendant may demur for defect of parties. The defect of parties "means to few, not to many parties." (35) The demurrer must specify what party is improperly omitted or improperly joined.(36)

REMARKS ON FIFTH SUBDIVISION.—*That the complaint does not state facts sufficient to constitute a cause of action.*

The words *cause of action*, as used in this subdivision, means "matter for which the action may be brought."

NOTE.—A demurrer to a complaint for any other cause than the six specified by the code should be overruled. Hultor vs. The I. & C. Railroad Co., 7 Ind. 622, *id.* 426, *id.* 664; 5 Ind. 375, *id.* 284, *id.* 530, *id.* 194, 249; 10 Ind. 308; 12 Ind. 427; 35 Ind. 348.

A demurrer assigning for cause that the several paragraphs of the complaint are not good and sufficient in law, presents no issue of law. Porter *et al.* vs. Wilson *et al.*, 35 Ind. 348.

A demurrer assigning any other cause than those specified in the statute, might be rejected on motion, or treated by the court as frivolous. Kensworth vs. Williams, 5 Ind. 375.

A demurrer is good in the language of the statute, and when the demurrer is not taken in the language of the statute, but points out a fact necessary to constitute a cause of action not alleged in the complaint is good so far as it goes, but does not embrace any objection to the sufficiency of the cause of action other than that specifically pointed out, although there be other defects that would have been reached by using the language of the statute. State vs. Leach, 10 Ind. 308; Newcastle Railroad Co., 9 Ind. 359; Colson vs. Smith, 9 Ind. 11, 18 Ind. 79.

A demurrer assigning for reason, "that the several paragraphs are not good and sufficient in law, raises no question for our consideration. It is not equivalent to the statement that the pleadings do not state facts sufficient to constitute a cause of action, nor is it any one of the statutory causes of demurrer. The statute enumerates and defines six causes of demurrer, and provides for no other.

Many defects may exist in pleading besides the six which by the statute may be reached by the demurrer; these must be objected to and reached upon motion. Campbell vs. Swazy, 12 Ind. 72, 11 Ind. 280, *id.* 458, 8 Ind. 284, *id.* 354, *id.* 530, 9 Ind. 194, 13 Ind. 418, 15 Ind. 361.

If the complaint is defective, the defendant should withdraw his answer and demurrer. He cannot move to dismiss or strike out pleadings for a technical defect. Williams vs. Post, 9 Ind. 551.

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(35) 17 Ind. 291. (36) 15 Ind. 297.

"A cause of action is said to accrue to any person when that person first comes to a right to bring an action." The cause of action is the injury or wrong committed by one party upon the rights of another which will sustain a suit.

Under this section you can follow the exact words of the statute, or you may point out the error in particular. But

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A demurrer applies merely to defects that appear on the face of the pleading. Hunt vs. Conn, 12 Ind. 257.

A demurrer under one subdivision does not reach any defect except that pointed out by that subdivision. Collins vs. New, 9 Ind. 209, *id.* 194.

A demurrer for defects of parties must point out the alleged defect. 16 Ind. 361.

A demurrer to an answer in the following form, viz: The plaintiff demurs to the first, second, third and fourth paragraphs of the defendant's answer, and assigns for causes of demurrer that they do not state facts sufficient to constitute a defense to the action. Held that the demurrer was not separate to each paragraph named, but joint and to entire answer, and if any one paragraph was good the demurrer should have been overruled. Brown vs. Gooden, 16 Ind. 444. The following form is substantially good: "The complaint does not state facts enough to entitle the plaintiff to relief. 12 Ind. 533.

When a complaint or bill of particulars filed therewith contained one good cause of action is not subject to demurrer. 16 Ind. 211.

A demurrer to one of several paragraphs for misjoinder of cause of action in a different paragraph may be stricken out on motion, and perhaps an error committed in refusing to strike it out might be corrected in the supreme court. 16 Ind. 151.

In case of a misjoinder of action there should not be a separate demurrer to each count, but one demurrer to the whole. 7 Blackf. 522, 16 Ind. 151.

A cause of demurrer designating the alleged defects in the pleading to which they state with a sufficient degree of certainty are good, though not assigned in any approved form. 10 Ind. 183, *id.* 424; Railroad Co. vs. Ward, 9 Ind. 123, *id.* 241, 7 Ind. 426, 13 Ind. 232. A departure in pleading is not a ground of demurrer; the objection must be taken by motion. 15 Ind. 194. A departure in pleading is a good cause for demurrer. Reilly vs. Rucker, 16 Ind. 303.

An objection that jurisdiction does not appear on the face of the complaint cannot be by demurrer. 9 Ind. 394, 10 Ind. 348.

Duplicity, by our statute is not a ground, but is a violation both of the rules of pleading at common law, and of the third subdivision of section 56 of the code. 11 Ind. 280, 12 Ind. 174.

The inconsistency of the reply with the complaint is the same defect known in common law pleadings as a departure. 8 Ind. 96, 12 Ind. 174, 9 Ind 189, 5 Black. 21, *id.* 306, 7 Black. 33.

An argumentative denial is good on demurrer. 14 Ind. 455, 9 Ind. 109, 11 Ind. 369, 14 Ind. 529,

Repugnancy of allegations is not ground of demurrer under the code. 13 Ind. 482.

if you undertake to point out the error in a special manner no other defect will be noticed.

If the complaint contains several paragraphs, and there is a general demurrer to the whole complaint, if there is one good paragraph the demurrer should be overruled(*d*).

A demurrer to an answer will not be sustained on the ground that the answer contained a denial of the plaintiff's allegation, and affirmative matter in avoidance. 8 Ind. 530.

A demurrer may be general if it assigns specific causes. 9 Ind. 241.

The defendant cannot be compelled to answer a complaint to which a demurrer has been sustained, unless the record made by the ruling be changed. 14 Ind. 537.

The court must, it is presumed, judicially notice a demurrer, and see that it is in substantial conformity to the statute. 7 Ind. 427.

A demurrer does not reach back through the pleading, unless on a question of jurisdiction. It is confined to the pleading to which it is immediately addressed. 7 Ind. 627.

The plaintiff by demurring which avers the cause of action in the second count admits the truth of the averment. 2 Ind. 176, 5 Black. 435.

When in an action before a justice of the peace, the defendant demurred, his demurrer was overruled, there was finding for the complainant; he appealed, and did not present the question in Common Pleas Court. Held, he waived the fact. 12 Ind. 406.

A demurrer was raised under the old practice by pleading over. 4 Black. 449, 6 Ind. 394, 8 Ind. 134, 3 Ind. 346, 7 Ind. 711. The question is now raised by entering an exception. 8 Ind. 96, *id.* 357.

A party by amending his pleading after demurrer has been sustained to it, waives his right to complain of the ruling on demurrer. 10 Ind. 180, 4 Ind. 217.

When the complainant demurs to the answer, but before the court has determined the demurrer replies thereto, he thereby waives his demurrer. 13 Ind. 382.

If a party demur, and pending his demurrer plead over, the pleading overrules his demurrer; but if both could stand it be presumed general finding that the issue on both were referred to the court together. 14 Ind. 523.

A party has a right to withdraw a demurrer at any time before judgment is recorded, unless the demurrer be frivolous. 1 Black. 301, 7 Black. 371.

It is within the discretion of the court to permit it to be done, at any time before trial. 7 Ind. 490.

A paragraph which is not a nullity should not be rejected on motion. 6 Ind. 350, *id.* 219.

A demurrer to a pleading containing two paragraphs should be overruled when one is good. 11 Ind. 458, 9 Ind. 241.

A joint demurrer filed by two defendants should be overruled, unless it is well taken by both. 12 Ind. 533.

(*d*) 34 Ind. 28.

Under this subdivision a party can not demur to a part of a paragraph. If there are unnecessary averments in a paragraph this can only be taken advantage of by motion to strike out. Unless the plaintiff's complaint states sufficient facts to authorize him to recover if he establishes these facts by the evidence, it is demurrable.

Judge Story's remarks upon the question of pleading is applicable in all cases under our code, "that it is an elementary rule of the most extensive influence that the bill should state the right, title or claim of the plaintiff with accuracy and clearness, and it should in like manner state the injury or grievance of which he complains and the relief which he asks of the court." In other words, the complaint must contain a statement of all the facts which the plaintiff would be bound to prove under the general denial in order to make out his case, and unless it does it is subject to demurrer.

It cannot be assigned for error that a demurrer was improperly sustained, if the same facts could have been given in evidence under another paragraph of the answer. 7 Ind. 374, *id.* 529, 6 Ind. 487, *id.* 477, *id.* 262, *id.* 309, 5 Ind. 224.

A party cannot complain of a decision in his own favor upon demurrer. 6 Ind. 387.

When an exception has been properly taken to a ruling on a demurrer, no motion for a new trial is necessary. 13 Ind. 332, 23 Ind. 507.

A demurrer only reaches such defects as are apparent on the face of the pleading to which it is directed. 25 Ind. 305.

A demurrer to the answer reaches back to the complaint, but a defect of parties cannot be reached in that way, that objection can be made only by demurrer to the complaint. 23 Ind. 395.

Where the general denial has been pleaded, it is not error to sustain a demurrer to another paragraph of the answer which alleges matter in denial of that which it would be incumbent on the plaintiff to prove to maintain his action. 26 Ind. 83.

Demurrer to an answer in abatement do not reach back to the complaint, for such answers are not addressed to the complaint. 18 Ind. 137.

If a demurrer be to the whole pleading, and there is one good paragraph, it should be overruled. 17 Ind. 213.

Where the demurrer is to an entire paragraph in a complaint for slander, it should be overruled if any set of words charged in the paragraph are actionable. 23 Ind. 507, *id.* 265.

When an answer consists of several paragraphs and a single demurrer is filed thereto, in which the plaintiff says he demurs to each paragraph, &c., the demurrer must be taken distributively, and it is equivalent to a separate demurrer to each paragraph, and may therefore be overruled as to part and sustained as to a part of the paragraphs. 19 Ind. 213.

REMARKS ON SUBDIVISION SIXTH.—*That several causes of action have been improperly united.*

It is provided by section seventy of the code "that the plaintiff may unite several causes of action in the same complaint, when they are included in the following classes:

First. Money demands on contract.

Second. Injuries to property.

Third. Injuries to person or character.

Fourth. Claims to recover the possession of personal property, with or without damages, for withholding the same and injury to property withheld.

Fifth. Claims to recover the possession of real property with or without damages, rents and profits for withholding thereof, to make partition of and to determine and quiet the title to real property.(40) If the plaintiff has united causes of action not authorized by this section, a demurrer filed for this reason should be sustained. But before the Board of Commissioners one will seldom, if ever, have an opportunity to file a demurrer for any other than the fifth statutory cause.

MOTION TO STRIKE OUT.

But it sometimes happens that the plaintiff has inserted in the same paragraph of his complaint some good and some bad allegations. When this occurs you can not demur, but you should move to strike out the irrelevant matter. It is provided by the code that "all frivolous demurrers and motions shall be overruled, all sham defences shall be rejected,

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A single demurrer which purports to be filed to each of several paragraphs of a complaint or other pleading, should be taken distributively as a separate demurrer to each, and may therefore be overruled as to part and sustained as to a part of the paragraphs. 20 Ind. 62, 19 Ind. 213.

A demurrer to a complaint on an administrator's bond assigning several breaches, one of which is well assigned, should be overruled. 19 Ind. 27.

When a reply consists of two paragraphs, of which one is the general denial, and the demurrer is filed to the reply generally, it is error to sustain it, because such demurrer is addressed to the whole complaint. 19 Ind. 90, 11 Ind. 458, 9 Ind. 241.

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(40) 2 Res. by G. & H., p. 96, sec. 70.

all surplusage tautology and irrelevant matter shall be set aside, when pointed out by the party aggrieved.(41) When several paragraphs of complaint are substantially the same in legal effect, they may all but one be stricken out on motion.(42) When the general denial is pleaded with another paragraph which sets up matter that might be given in evidence under the general denial, the latter paragraph should be stricken out on motion.(43) If a "plea shows on its face that it is a sham plea, it should be rejected on motion.(44)

It is provided by section ninety of the code that "when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge is not apparent, the court may require the pleading to be made definite and certain by amendment."(45) In order to reach defects of this character you must move the board for an order to compel the plaintiff to make his complaint more definite and certain. If your motion is sustained the board will enter an order of record that the plaintiff will make his pleading more definite and certain, by amendment, against a certain day, or hour, to be designated in their order.(46) Or you may put your motion in a different manner, and move that the plaintiff make his pleading more specific.(47) It is always the best, in order to present your motion in a clear, unambiguous light to the court, to reduce it to writing, but an oral motion to strike out pleading or to make more specific, &c., will be entertained by the court.(48) But the Circuit Courts throughout the State possess the power to establish such rules of practice as they may deem necessary to facilitate business and to further the ends of justice in their courts. Hence they may by such rules require all motions to be reduced to writing.(49) A demurrer which assigns

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(41) 2 G. & H. p. 102, sec. 77. (42) 21 Ind. 492, *id.* 471, 18 Ind. 273, 29 Ind. 618, 25 Ind. 352. It is not error for the court to refuse leave to file answer setting up a sham defense. 25 Ind. 90. (43) 7 Black. 526, 8 Black. 256, 4 Ind. 630, 11 Ind. 284, 12 Ind. 41. (44) 1 Black. 347, 5 Black. 287. (45) 2 G. & H. p. 112, sec. 90. When some relief is sought by way of motion pending the cause, the same fullness and particularity are not necessary which would be required in an original complaint. 20 Ind. 232. (46) 27 Ind. 191, 19 Ind. 10. (47) 17 Ind. 291. (48) 22 Ind. 178. (49) 22 Ind. 178, 20 Ind. 232. A motion to strike out a part of a pleading need not be in writing unless required by a rule of the court in which it is made. 22 Ind. 178.

no cause, as required by the statute, should be stricken out on motion.(*a*)

After the questions as to the sufficiency of the complaint have been settled, the defendant must file his answer. And the code provides that the answer "shall contain a denial of each allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief." "A statement of any new matter constituting a defense, counter-claim, or set off, in plain, concise language without repetition." And he may set forth in his answer as many grounds of defense, counter-claims and set off, whether legal or equitable, as he shall have. Each shall be distinctly stated in a separate paragraph and numbered, and clearly refer to the cause of action intended to be answered.(50)

Under these sections our Supreme Court, in the case of Carpenter et al. vs. Mercantile Bank, held that a plea in abatement could not be pleaded in connection with a plea in bar.(51)

And in the case of Jones vs. Cincinnati Co., the same court held that a plea in abatement should always precede answers to the merits.(52)

But in the case of Thompson vs. Greenwood, they overruled all former decisions upon this point, and held that all the defenses, both of law and facts, must be filed at the same time, and the issues formed under them must all be tried together.(53)

The following is the statutory form for an answer:

STATE OF INDIANA, ——— County:

Before the Board of Commissioners:

JOHN SMITH *vs.* RICHARD ROE.

The defendant, for answer herein, says that he denies each and every allegation of the complaint.

RICHARD ROE.

(*a*) 29 Ind. 360. (50) 2 Res. by G. & H. p. 83, sec. 50. (51) 17 Ind. 236. (52) 14 Ind. 89; 16 Ind. 402; 17 Ind. 447; 11 Ind. 398. (53)

Form for plea in abatement.

STATE OF INDIANA, ——— County:

JOHN SMITH *vs.* RICHARD ROE.

The defendant pleads in abatement of the writ and complaint herein that the contestor, John Smith, was not at the October election, in the year 1870, a legal voter of ——— county, but that he was then, and now is, a minor, under the age of twenty-one years. Wherefore the contestee prays that the writ and complaint may abate.

RICHARD ROE.

Subscribed and sworn to before me this —— day of ——, 1870. JOHN SHORT, Auditor.

A plea by way of confession and avoidance, after entitling as above:

The defendant for answer herein says, that if the fraudulent votes mentioned in the contestor's written statement were cast for this defendant, at said election, that if these votes are taken from the whole number of votes cast for this defendant at said election, that he still has the majority of the legal votes of said county, for the reason that there were cast and counted to the contestor, Richard Roe, for commissioner from the third district of said county at the Union precinct, in Helt township, one hundred and fifty illegal votes; that these votes were cast by persons whose names are unknown to this defendant, he therefore prays judgment for costs. RICHARD ROE.

It is provided by the code that "when it is necessary for the defendant to bring a new party before the court, he may state the matter relating thereto in his answer and demand relief, and thereupon a summons shall issue and other proceedings be had against him as if such matter had been exhibited in the original complaint."(54.) And in the case of Conklin vs. Bowman our Supreme Court, in commenting

(54) 2 Res. by G. & H., p. 92.

on this section says: "This rule of practice, as we understand it, contemplates a necessary party against whom relief is sought and final judgment may be rendered." "The answer must not only state the matter relied on for relief, but must contain a prayer for such against the proper new party."(55)

But in contested election cases the defendant will seldom if ever have an opportunity to exercise the right guaranteed to him by this section. And it is further provided by the code that, when the facts stated in the answer are not sufficient to constitute a cause of defense, the plaintiff may demur to one or more of several defenses under the same rules and regulations as heretofore prescribed for demurring to the complaint.(56) The answer is an allegation by the defendant that is calculated, if true, to defeat or lessen the plaintiff's right to recover; and unless the allegations in the answer, if established by the evidence, would accomplish one of these objects, it would be clearly bad on demurrer.

The question that the members of the board should propound to themselves and answer, in arriving at a conclusion upon the sufficiency of the answer, is this: Will the matter set up in the answer, if established by the evidence, defeat or lessen the plaintiff's right to recover under the allegation of his complaint. And if after a mature consideration, they answer this question in the affirmative, they should overrule the demurrer to the answer, but if they find in the negative, the demurrer should be sustained. If the defendant in his answer attempts to answer the whole complaint, when in fact he only answers a part, it will be bad on demurrer.(57)

The following is the form of demurrer to answer:

STATE OF INDIANA, }
——— County, } ss:

Before the Board of Commissioners of —— County.

JOHN SMITH *vs.* RICHARD ROE.

The plaintiff demurs to the answer for the reason that it

(55) 11 Ind. 254. (56) 2 Res. G. & H. p. 92, sec. 64. (57) Feaster vs. Woodfield, 23 Ind. 493.

does not state facts sufficient to constitute a cause of defense.

JOHN SMITH.

If there is a demurrer filed to a whole answer, and it consists of several paragraphs, if any one of the paragraphs contains a good defense, the demurrer should be overruled. (58) We state on *ante*, p. — that the defendant could set up as many defenses as he may have, &c., but that they must be set up in separate paragraphs and numbered. And our supreme court in the case of Wilson vs. The Evansville and Cleveland Railroad Company, in commenting upon section 56 of the statute, held that "Whenever a party, therefore, assuming that he has different grounds of defense, whether they really amount to such or not, sets them up in separate paragraphs, he should number them, and if he did not, this court could not say that the court below erred in sustaining a demurrer to the whole answer." (59) Our supreme court, in the case of Brown vs. Gooden, held that a demurrer in the following form, "The plaintiff demurs to the first, second, third and fourth paragraphs of the defendant's answer, and assigns for cause of demurrer that they do not state facts sufficient to constitute a defense to the action," was not a separate demurrer to each paragraph, but joint and to the entire answer.(60) But in the case of Parker vs. Thompson, the same court held that a demurrer in the following form, "The plaintiff demurs to each paragraph of the answer, etc.," should be taken distributively, and was equivalent to a separate demurrer filed to each paragraph of the answer.(61)

The plaintiff can move to make the answer more specific or to strike out irrelevant and redundant matter, &c. And the same rules that apply to motions of this character when made to the complaint, will govern motions to the answer. And for authority upon this point we refer the reader to our comment on *ante* page —.

After the question as to the sufficiency of the answer has been settled the plaintiff should be ruled to reply, provided

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(58) 15 Ind. 242. (59) 9 Ind. 510. (60) 16 Ind. 444. (61) 19 Ind. 213.

the defendant has set forth in his answer material new matter of defense. The reply is for the purpose of contradicting or avoiding the affirmative matter set up in the answer. Our Supreme Court, in the case of Wilson vs. The Madison, &c., R. R. Co., held that "a reply is bad which does not state facts sufficient to avoid the answer and show the plaintiff is entitled to recover."(62)

It is provided by our code that "when the answer contains new matter the plaintiff may reply thereto denying each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege in plain and concise language, without repetition, any new matter not inconsistent with the complaint and constituting a defense to the answer. The defendant may demur to a reply for any of the causes specified for demurring to a complaint."(67)

It will be readily seen that under this section that a reply is only necessary when new matter is set up in the answer.(63) And the plaintiff may set up in his reply several independent defenses, and tender several issues, provided they are not inconsistent with his complaint.(64) An argumentative reply is good, provided it sets up facts inconsistent with the allegation in the answer.(65) A departure is "always a confession of the answer without alleging sufficient facts to avoid it and make a new case," hence a departure may be taken advantage of by demurrer.(66) There is something peculiar about the wording of section sixty-seven of the code set out above. It says "that the defendant may demur to the reply for any of the causes specified for demurring to a complaint. If this section was construed literally the plaintiff would be compelled to reiterate the same matter in his reply that he had previously set up in his complaint. And our Supreme Court, in the case of McAvoy and another vs. Wright, in commenting upon this section, say: "The statute expressly forbids a departure, but adds, very strangely, that the defendant may demur to

(62) 18 Ind. 226. (63) 6 Ind. 309. (64) Zachnor vs. Beard, 8 Ind. 96. (65) 12 Ind. 89; 14 Ind. 529. (66) 25 Ind. 22. (67) 2 Res. by G. & H., p. 94, sec. 67.

a reply for any of the causes specified for demurring to a complaint." "This is simple nonsense, and if construed literally would make any reply that a sensible lawyer would be willing to prepare subject to demurrer. It can not be so construed, for it is beyond belief that the Legislature meant to require that a reply should repeat the complaint." "If it seeks new matter to avoid the answer and does not allege sufficient facts for the purpose, it must be held bad on demurrer, assigning that cause."(68) "All new matter in a reply is to be deemed controverted by the adverse party."(69)

After the questions on the pleadings have been settled by the board, and the issues are joined between the parties, the board should proceed at once with the trial of the cause, provided both parties are ready. (The statute provides "that for good cause shown the court may continue the cause at any stage of the proceeding at the cost of the applicant, to be paid as the court may direct."(70) But we refer the reader to *post* page —, for continuance.)

"The party on whom rests the burthen of the issue may briefly state his case and the evidence by which he expects to sustain it." "The adverse party may then briefly state his defense and the evidence he expects to offer to support it." The party on whom rests the burthen of the issue must first produce his evidence; the adverse party will then produce his evidence.(71) (As to the question of who has the burthen of the issue we refer the reader to our comment on the argument, *post* page —.) After the parties have made their statements to the board the sheriff should call the plaintiff's witnesses, who will all stand up and take the following oath: You do solemnly swear that the evidence that you shall give in the cause now pending in which John Smith is plaintiff and Richard Roe is defendant, shall be the truth, the whole truth, and nothing but the truth so help you God.(72) (See *post*, page —, as to the competency and examination of witnesses.)

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(68) 25 Ind. 22. (69) 2 Res. by G. & H., p. 100. (70) 2 Res. by G. & H., p. 198, sec. 323. (71) 2 Res. by G. & H., p. 199. (72) 2 Res. by G. & H., p. 167, sec. 236.

The plaintiff will then be permitted to introduce his evidence to the board. As soon as the plaintiff closes his examination, the defendant's witnesses must be called by the sheriff and sworn. The defendant will then introduce his evidence. After the defendant has closed his evidence, if he has introduced any new matter not responsive to the evidence introduced by the plaintiff, the plaintiff may then be permitted to give further evidence in support of his claim; that will have a tendency to invalidate and overturn the affirmative evidence introduced by the defendant. After the evidence is closed the parties may submit the cause without argument to the board. But if they wish to argue the same, the provisions of the law must be followed. The statute provides that "In the argument the party having the burthen of the issue shall have the opening and closing; but shall disclose in the opening all the points relied on in the cause, and if in closing he refers to any new point or fact not disclosed in the opening, the adverse party shall have the right of replying thereto, which reply shall close the argument in the case."(73) The issue is "a certain and material point deduced by the pleadings of the parties, which is affirmed on one side and denied on the other."(74) It is one of the rules governing the production of evidence, that "the burthen of proving a proposition or issue, lies on the party holding the affirmative." This means that he who asserts a proposition to be true in his pleadings, must, in order for it to avail him anything on the trial, establish it by the evidence. Under this rule, if all the allegations set up by a party were denied by his adversary, the party who affirmed a proposition would be compelled to establish it by his evidences. But it sometimes happens that a party has had a good cause of action against another, but has by some means lost his right of action. To illustrate, suppose A is indebted to B by note to the amount of one hundred dollars; A pays the note in full, but B fails to surrender the same to A, or indorse the payment on the note; B afterward sues A on the note; A comes in and by his plea

(73) 2 Res. by G. & H. p. 202, sec. 326. (74) Stephens on Pleading, pp. 23, 24.

admits the execution of the note, but alleges that on a certain day he paid the same in full. The execution of the note being admitted, the burthen of the issue would be on the defendant A, and he would be entitled to open and close the argument. In the case of Bowen vs. Spears et al., our Supreme Court, in commenting on this section of our statute, says, "We understand it to mean that where there are several issues, and the plaintiff is required to prove any one of them before he is entitled to a verdict, he is to begin. This rule we recognize as correct. The fact that the plaintiff, in addition to their denial of the set-off, had replied affimatively thereto, setting up new matter, cannot change the burthen, because, until the defendant had proved a set-off, the plaintiff could not be called upon to prove their special replication."(75) But let us illustrate still further: Suppose that John Smith files his written statement with the board of commissioners to contest the election of Richard Roe to the office of commissioner, and alleges that at said election there were cast for the said Richard fifteen hundred votes, and that he received fourteen hundred. But he further alleges that one hundred and fifty of the votes that were cast for the said Richard, were cast by persons who were not entitled to a vote. The defendant Roe comes into court and admits that the facts set up in Smith's complaint are true, but alleges by way of avoidance, that there were cast for the plaintiff Smith for said office, at said election, one hundred and seventy-five illegal votes; this allegation is denied by the plaintiff Smith; this would shift the issue from Smith to Roe, and the defendant or contestee would have the right to open and close the argument.(76) If the general denial is pleaded in connection with a plea of confession and avoidance, the plaintiff should always be permitted to open and close the argument. The board may, if they wish, refuse to hear any argument at all; and they may limit the argument to any length of time they please.(77)

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(75) 20 Ind. 146, 17 Ind. 612, *id.* 183, *id.* 396, 20 Ind. 492, 27 Ind. 308, 26 Ind. 27. (76) 10 Ind. 253, 2 Black. 320, 9 Ind. 189, 4 Ind. 531. (77) 4 Ind. 84, 5 Ind. 39, 9 Ind. 587, *id.* 541.

Where there are more than two attorneys in a case who wish to argue the cause, the general rule is to give each party a certain specified time and let them subdivide it to suit their own convenience. But if an attorney is to be limited in his argument, he should be notified of that fact before he commences the same, otherwise he might be greatly embarrassed in presenting his case to the board. The board acts as a presiding officer on the trial, and they should, therefore, exercise a kind of supervisory power, and should confine the argument of counsel to the points at issue, and restrain them from indulging in personalities and from impertinent topics.(78) After the board has heard the evidence and argument of counsel they must render their verdict, and enter the same of record. The record should show the finding of the board and give a general history of the case. It may be in the following form:

JOHN SMITH *vs.* RICHARD ROE.

Special Session of the Board of Commissioners of —— County:

Comes now the parties in person, and by their attorneys, and submits this cause to the board. And after hearing the evidence and argument of counsel the board finds that at the October election, in the year 1870, in ——— county, the contestor, John Smith, received one thousand legal votes for commissioner from the third district of ——— county, and that the contestee, Richard Roe, received one thousand and twenty-five legal votes at said election for said office. The board therefore finds that the said Richard Roe was, at said election, duly elected commissioner from the third district of said county by the qualified voters of said county, and that he is now entitled to his commission as such commissioner. And it is ordered that the auditor of this county certify the finding of this board forthwith to the Clerk of the Circuit Court of this county, and that he issue a commission to the said Richard Roe as such commissioner according to law. And it is further adjudged that the contestee recover of the contestor the cost in this behalf expen-

(78) Read vs. The State, 2 Ind. 438.

ded, amounting to seventy-five dollars, and the auditor of this county issue a fee bill for the collection of the same after the expiration of twenty days.

This —— day of ———, 1870.

S.
B.
R. } *Commissioners.*(79)

If the finding is for the contestor let the record show that fact and the auditor certify the same to the Clerk of the Circuit Court.

As soon as the clerk is notified according to law of the finding of the board, he must issue a commission to the successful party. It is true that the defeated party has ten days to appeal from the judgment of the board to the Circuit Court. But if the appeal is granted after the commission is issued it will have the effect of annuling the commission until the question is finally adjudicated.(80) On receiving the commission the successful party must qualify according to law. See *ante*, p. —.

(79) 1 Res. by G. & H., p. 319, sec. 19.

(80) 1 Res. by G. & H., p. 319, sec. 20; 30 Ind. 266.

NOTES ON CONTESTED ELECTION.—(27 Ind. p. 191.)

WHEAT *vs.* RAGSDALE.

APPEAL from Johnson Circuit Court.

ELLIOTT, J.—The appellant and appellee were opposing candidates for the office of Treasurer of Johnson county, at the annual election in October, 1864. The Board of County Canvassers declared Wheat elect to said office by a majority of one hundred and seventy-nine votes, and therefore Ragsdale instituted these proceedings before the Board of Commissioners against Wheat to contest said election. Within ten days after Wheat was declared elect, Ragsdale filed with the auditor of said county a written statement specifying the ground of contest, verified by affidavit sworn to before said auditor. The specifications were stated as follows. First, for malconduct of William McCaslin, inspector of election precinct in the township of Franklin in said county, in this, to-wit: that the said William McCaslin, in violation of his duty as such inspector, corruptly, unlawfully and fraudulently took out of the box in which the ballots at said election were deposited, which was in his custody, and destroyed two hundred legal tickets or ballots, deposited by legal electors at said election, and before said ballots were counted, on which was the name of the

contestor as a candidate for said office of Treasurer of Johnson county, and put in said box in lieu thereof two hundred and sixteen ballots, or tickets, on which was the name of the said Melville Wheat, contestee as aforesaid for said office of Treasurer; and further, that the said William McCaslin, trustee and inspector as aforesaid, having possession of said ballot-box, and before the ballots therein had been counted, negligently left said box so exposed that some person or persons to the contestor unknown, corruptly, unlawfully and fraudulently took out of said ballot-box and destroyed two hundred legal ballots or tickets on which the name of the said contestor was placed as a candidate for the office of treasurer as aforesaid, and put in said ballot-box in lieu thereof, two hundred and sixteen tickets, or ballots, on which was the name of the said Melville Wheat, as a candidate for the said office of Treasurer of Johnson county. Second. And for further cause of contest herein the contestor states that at said election, held at the usual place of holding elections in said county, as aforesaid, there was a large number of illegal votes or ballots cast for the said contestee, and counted for him by the board of election aforesaid, to-wit: two hundred legal tickets, or ballots, having on them the name of the contestor for the office of treasurer of Johnson county, were fraudulently, corruptly and unlawfully taken out of the ballot-box in which were deposited the ballots for the township of Franklin, and destroyed by some person or persons to the contestor unknown, and two hundred and sixteen illegal ballots, or tickets, were placed in said box in lieu of those taken out, having on them the name of Melville Wheat for treasurer as aforesaid. Fifty illegal votes, or ballots, were permitted to be deposited at the election aforesaid, in the ballot-box then used for the purposes of said election in the township of Blue River, by persons unknown at this time to the contestor, who were not then twenty-one years of age, and by other persons who did not reside in said township. Twenty illegal votes, or ballots, were permitted to be deposited, at the election aforesaid, in the ballot-box, then and there used for the purposes of said election, in the township of Clark, by persons whose names are unknown at this time to the contestor, who were then under the age of twenty-one years, and by others who did not reside in said township. On all the above named illegal votes, or ballots, the name of Melville Wheat, the contestee, was placed as candidate for the office of Treasurer aforesaid, and all said votes were counted by the said election boards for the said Melville Wheat. He states that there were other illegal votes or ballots cast at said election in other townships of said county, having on them the name of the said contestee for Treasurer as aforesaid, and which were counted for him, but the number thereof, and the names of the persons who deposited them, are not known to the contestor.

Wheat had been duly notified of the pendency of the proceedings, appeared before the commissioners and filed a written motion to dismiss the cause for the following reasons, viz:

1. Because the complaint did not state facts sufficient to constitute a cause of contest.

2. Because the averments in the complaint were indifferent, uncertain and contradictory.

3. Because the statement of the contestor was not verified by sufficient affidavit.

This motion was overruled, and he then moved that a certain portion of the statement of the cause of contest be stricken out for the reason, as to some of them, that they were indefinite and uncertain in their averments, and as to others, in which illegal votes were alleged to have been given for the defendant, because it was not averred how many such illegal votes were given, who gave the same, nor in what the lack of qualification in such voters consisted, nor any member of the board of judges or canvassers at any precinct where the same were deposited was guilty of any malconduct, whatever, and because the names of the persons who cast such illegal votes were not given.

This motion was also overruled, and the defendant then demurred to each cause of contest. The demurrers were overruled, and he then moved the court that the plaintiff be required to furnish the names of the persons who deposited the illegal votes, as in his statement alleged. This motion was sustained, and in obedience to this ruling the plaintiff filed a list containing the names of forty-eight persons alleged to have voted at this election in Franklin township, in said county, most of whom were alleged to be non-residents of the township, and the others, minors under twenty-one years of age; and also the names of three persons alleged to have voted at said election in Clark township, in said county, but who were not residents thereof.

The defendant answered in four paragraphs. The first was the general denial; the second, third and fourth alleged that illegal votes were given in the several townships of said county for the plaintiff, stating the number of such illegal votes by persons under twenty-one years of age, and by persons who were not residents of the township in which they voted, and by other persons who had not resided in this State six months next preceding the time of said election; and by others of foreign birth, who had not declared their intention to become citizens of the United States; and by other persons of foreign birth, who had not resided in the United States for one year before said election.

The plaintiff replied in denial of the said second, third and fourth paragraphs of the answer.

The contest was tried by the Board of Commissioners of the county, who found that at said election Ragsdale received 1,731 votes for said office of Treasurer, and that said Wheat only received 1,571 votes, and that Ragsdale was, therefore, duly elected to said office, and judgment was rendered accordingly. Wheat appealed to the Circuit Court. In the latter Court Wheat renewed his motion to dismiss the cause for the same reasons substantially as those filed before the commissioners. The motion was overruled and he excepted. He then moved the Court to strike out each separate allegation of the statement of the grounds of contest: 1st. Because the statement of the contestor is not verified by sufficient affidavit. 2d. Because said statement does not state facts sufficient to constitute a cause of contest. 3d. Because the averments in said statement are indefinite, uncertain and contradictory. During the pendency of this motion, the plaintiff, over the defendant's objection by leave of the Court, filed a supplemental statement making more specific the cause of contest, to which the defendant excepted. The statement consisted of the names of persons who are alleged to have voted illegally for the defendant at said election in Franklin and Clark township, they being either under twenty-one years of age, or non-residents of the township in which they voted, and is in substance the same as that filed before, and by the

order of the commissioners, at the instance and on the motion of the defendant, except that it was sworn to by the plaintiff in open Court. The defendant then renewed his demurrer to the plaintiff's statement of the cause of contest, and to each cause separately, which the court overruled and the defendant excepted. The answer of the defendant was filed, and on the plaintiff's motion he was ordered to make the second third and fourth paragraphs of the answer, and on his declining to do so, it was thereupon ordered by the court, that no evidence should be heard in relation to the said second, third and fourth paragraphs of the answer, to which ruling the defendant excepted. By agreement of parties the cause was submitted to the Court for trial without the intervention of a jury. The Court found that Ragsdale was legally elected to the office of Treasurer by a majority of thirty-eight votes, he having received 1,638 votes, and Wheat, the defendant, 1,600 votes. Motion for a new trial overruled, and judgment. Wheat appeals. Several questions are presented by the appellant as grounds for the reversal of the finding and judgment of the Circuit Court, which will be considered in the order in which they are named in the appellant's brief. The first objection presented is, that the county Auditor was not authorized by law to administer the oath to Ragsdale, the contestor, by which his written statement of the grounds of contest was verified; that as the Auditor had no power to administer the oath, the verification was void, and that the court therefore erred in overruling the defendant's motion to dismiss the proceedings.

The statute requires that the statement of the grounds of contest in such cases shall be verified by the affidavit of the contestor. 1 G. & H. sec. 16, p. 318. In Allen vs. May, 8 Blackf. 310, the statement of the cause of contest was sworn to before the Clerk of the Circuit Court, under the statute of 1843, and it was held that the Clerk of the Circuit Court, he not acting as Clerk of the Board of County Commissioners, was not authorized to administer the oath in that behalf; that the statement was, therefore, insufficient for the want of a proper affidavit, and did not authorize either the Board of County Commissioners or the Circuit Court to take cognizance of the cause. Had the auditor of Johnson county authority to swear Ragsdale to the affidavit attached to the statement of the cause of contest? The statute requires that such contest shall be tried by the Board of County Commissioners, of which the County Auditor is ex-officio clerk. It also provides that when any elector shall choose to contest such election he shall file with the auditor of the proper county, within ten days after such person has been declared elected, a written statement, specifying the grounds of contest, verified by the affidavit of such elector. 1 G. & H., sec. 16, p. 318.

Sec. 17. When such statement is filed with the auditor of the proper county he shall immediately give notice in writing to the Clerk of the Circuit Court that the election of such officer is contested, &c. Section eighteen requires the auditor upon filing of such statement with him to issue a notice to the Board of County Commissioners to meet at the Court House at a designated time, not less than ten days nor more than twenty days thereafter, to try such contest. It also makes it the duty of the auditor to issue a notice to the contestee to appear at the same time and place specified in the notice to the commissioners. The eighth section of the act in relation to County Auditors (1 G. & H., p. 123,) provides that "auditors and their deputies are authorized to administer oaths necessary in the performance of their duties; also the oath of office to the person who receives his certificate of appointment or election from such auditor, and oath relating to

the duties of such office." It is conceded by the appellant's counsel in argument that the auditor, as the Clerk of the Board of County Commissioners, may administer all oaths required in such cases during the pendency before that court, but it is argued that the duties of the auditor in such cases do not commence until after the statement of the grounds of contest verified by the affidavit of the contestor has been filed with the auditor, and therefore that the swearing of the contestor to such statement does not pertain to the duties of the auditor, nor is it necessary in the discharge of his duty that he should administer the oath. It must be conceded that the argument is at least plausible, and that the power of the auditor to administer the oath is not entirely free from doubt, but in lieu of the general policy of the State, that the clerk of the court in which any suit or proceeding is required by law to be instituted, is authorized to administer all oaths necessary therein both in its institution and during its progress, it seems to be but a fair and reasonable construction of the statute that the oath of verification of the contestor of his statement of the grounds of contest may be administered by the auditor as pertaining to and as being necessary and proper in the discharge of his duties. But it is insisted by the appellant that if the auditor was competent to administer the oath still the affidavit was insufficient under the statute, and the proceedings for that reason have been dismissed. The affidavit reads thus:

"William S. Ragsdale, the above named contestor and elector of Johnson county, Indiana, upon oath says, that the matter and facts set forth in the foregoing complaint, so far as the same are stated on his own knowledge, are true, and so far as they are stated on information derived from others he believes them to be true. WILLIAM S. RAGSDALE."

It was duly sworn to before the auditor, whose *jurat* was properly attached. The objection urged to the affidavit is that neither it nor the statement of the grounds of contest show what particular matters are stated upon the personal knowledge of the affiant, and what on the information of others, and hence that the affidavit is uncertain, indefinite and evasive, and therefore insufficient.

We do not so understand the statement of the grounds of contest. Every material allegation in it is stated directly and positively as upon the knowledge of the contestor. True, in one of the specifications he charges the inspector with fraudulently taking from the ballot-box two hundred legal ballots with his name on them for treasurer, and putting into the ballot-box in their stead two hundred and sixteen illegal ballots with the name of Wheat on them for the same office. While in another specification he charges the inspector with carelessly and negligently leaving the ballot-box exposed so that some person or persons, to the contestor unknown, fraudulently abstracted from it two hundred legal votes with his name upon them for treasurer, and put into said box two hundred and sixteen fraudulent ballots with the name of Wheat upon them for the same office; but both statements are made in direct and positive terms, without qualification, as upon his own knowledge, and not upon the information of others. It must be answered that the statement is directly verified by the affidavit. There being no qualification that any of the facts alleged were derived from information of others the latter and qualifying clause of the affidavit has no application, and properly should have been omitted. Kincade vs. Kipp et al., 1 Duer 692; Pitkins vs. Boyd, 4 (Green) Iowa R. 255.

The next question presented by the appellant, and relied on for a reversal, re-

lates to the action of the court in permitting Ragsdale to file a supplemental statement of the grounds of contest. The amendment or supplemental thus filed, as before stated, related to the illegal votes alleged in the original statement to have been given for Wheat by persons under twenty-one years of age, and by non-residents in the townships of Franklin and Clark, and consisted simply of the names of the persons so alleged to have voted illegally in those townships, and was in substance the same as the list filed before the commissioners at the instance of Wheat. The court permitted it to be filed pending the appellant's motion to strike out those specifications for uncertainty. It is assumed by the appellant's counsel that the specifications were insufficient because they did not contain the names of the persons who it was claimed therein had voted illegally. In this view we do not concur. The cause of contest contained in the specifications referred to comes within the fourth statutory cause, to-wit, on account of "illegal votes," and we think it was the right of the contestor to prove as many illegal votes as he could, under those specifications, in the township named, and that it was not necessary to state the names of the illegal voters in the statement of the ground of contest. The only effect the supplemental statement filed by the contestor could produce would be to limit his proof of illegal votes to the persons named, and the appellant could not, therefore, be injured by the action of the court in permitting it to be filed. We need not therefore determine the question of the right of the contestor to amend his statement by leave of court.

For the reason stated above, we think the court erred in ordering that the appellant should not be permitted to introduce any evidence under the second, third and fourth paragraphs of his answer. Indeed this order seems to be without authority to support it in practice. If the paragraphs were so defective as not to admit of any evidence under them, the demurrer to them should have been sustained, or they should have been stricken out, on motion, on the refusal of the appellant to make them more certain.

A bill of exception purports to contain all the evidence given in the cause, and shows that during the trial the plaintiff offered in evidence the record of the trial before the Board of County Commissioners, to which the appellant objected, but the Court overruled the objection, and permitted the record to be given in evidence, which was accordingly done. This ruling was excepted to. The object of the evidence was to prove certain admissions by the appellant on the record on the trial of the cause before the commissioners. The statement in the record as to the admission of the appellant is as follows: "And the contestor, in discharging the motion entered against him, files a list of fifty illegal votes cast in the several townships at said October election, and the contestee for the use and purposes of this trial, concedes that such votes were minors and non-residents, as in said list set forth. And the said contestor now presents a list of 312 names of men who have made affidavit that they voted for the contestor at said October election, and the said contestee, for the use and purpose of the trial, conceded that the said men did vote for the said contestor as alleged. And said contestor now files a list of forty-six names of men who voted for said contestor as aforesaid." After this evidence was admitted by the court, the appellant filed the affidavit of Overstreet and Hunter, in which it is stated that on the trial of the cause before the Board of Commissioners they appeared as the attorneys of the contestee, and as such attorneys, during the investigation of the cause before the commissioners, for the purpose of avoiding a long, tedious and

unavailing investigation of the said cause, before said commissioners, under the issue there made, they made the concessions contained in the transcript of said proceedings; that at the time said concessions were made, it was understood, intended and expected, by the said affiants and the other attorneys for said contestee, that they were made to be taken and considered as evidence against said contestee, on the trial of said cause before said commissioners, for the purposes aforesaid, and not to be used against said contestee on the trial of said cause on appeal to the circuit or any other court, and that at the time the concessions were made, the attorneys for the contestor believed and understood the attorneys for the said contestee to be making them for the purpose aforesaid, and to be taken as evidence on the trial before the commissioners only, and not elsewhere, and that they were made by the said attorneys without any advice or direction from said contestee to make them. Upon this affidavit the contestee moved the court to reject said record as evidence, but the court overruled the motion, to which appellant excepted. It is clear to our mind that the court erred in permitting the record of these alleged admissions to be given in evidence. A party to a suit may bind himself by admissions of record of material facts involved in the case, where such admissions are made for the purposes of the suit, but here the facts alleged were not admitted to be true in fact, but were simply conceded to be so for the purpose of the trial before the commissioners.

The appellant's majority in the county, as declared by the county canvassers, was only 179 votes. His majority in Franklin township, as returned by the township board, was 611, out of a total vote of 995, and if he intended to admit it to be true that he received fifty-eight illegel votes at that poll, as stated in the list filed by the contestor, thus reducing the whole number to 947; and if he intended further to admit that the contestor in fact received of the last number 358, it would reduce his own vote in that township to 589, and his majority there to 321 instead of 611, as returned by the township board, thus conceding the election of the contestor beyond controversy. With such an admission of facts staring him in the face, it would be the extreme of folly to contest the case further. But from the language of the concessions, as well as from all surrounding facts, it is clear that the appellant did not admit, and did not intend to admit as true, on a final trial, the matters so conceded before the commissioners. The concessions had served the purpose for which they were made, when the trial before the commissioners terminated, and they should not have been received as evidence against the appellants on the trial in the Circuit Court. The effect given by the court to these allegations, admissions of record, as will hereafter appear, determined the case against the appellant. The finding of the court is in the form of a written opinion upon the questions of both law and fact involved in the case. The length to which this opinion has already grown forbids a statement of that opinion at length. A reference, however, to the final conclusion of the court upon the evidence seems to be necessary for the purpose of showing the effect given by the court to the alleged admission of the appellant on the trial before the Board of Commissioners.

The court found that the whole number of votes returned by precincts in the county to the County Convassers for these parties respectively, was for Wheat, 1,741, and for Ragsdale, 1,562; that of the whole number so returned the Board of Franklin Township returned for Wheat 803, and for Ragsdale 192; that only

982 votes were polled at said election in Franklin township, of which number it was proved that Ragsdale received 268, seventy-six more than was returned for him to the County Canvassers, which add to 1,562, the total number returned to the County Canvassers, made his total vote in the county 1,638. It was further found that Wheat could only have received 714 votes in Franklin township, being eighty-nine less than the number returned for him from that township, which being deducted from the aggregate returned for him in the county, reduces it to 1,652. The finding of the court then proceeds: It is admitted of record that fifty-one illegal votes were cast for the contestee, the persons who cast said votes being minors and non-residents.

The evidence also shows that one minor in Clark township, not on the admitted list, also voted for him, making fifty-two. This number the court also deducted from Wheat's aggregate in the county, thus reducing it to 1,600, or thirty-eight less than the aggregate found in favor of Ragsdale. The fifty-one illegal votes here claimed to be admitted of record has reference to the list of that number filed by Ragsdale before the County Commissioners, forty-eight of whom were alleged to have voted in Franklin township and three in Clark, and in reference to which the appellant for the purpose of that trial conceded that the persons there named were minors and non-residents, as alleged in said suit. It may be remarked in reference to the concession made as to that list, that it can not be claimed to be an admission, as the court seems to have regarded it, that the persons named had voted in said township, or that they had voted at all, but only that they were minors and non-residents as alleged. If, then, the admission or concession of the facts stated, was even conclusive upon Wheat, it would not prove that fifty-one illegal votes were cast for him, but only that the persons named were minors and non-residents; and it would still require other evidence to prove that they voted for Wheat. The court found from the evidence that only two hundred and sixty-eight votes were given for Ragsdale in Franklin township, while it was conceded by the appellant before the commissioners that three hundred and fifty-eight persons had voted for Ragsdale at that poll. This was a concession of all that was necessary to enable the commissioners to credit Ragsdale with that number of votes, and if the concession of fifty-one illegal votes was conclusive upon Wheat it would certainly be equally conclusive as to the three hundred and fifty-eight votes for Ragsdale, and we are at a loss to perceive upon what principle the court held the one conclusion and disregarded the other.

One other question remains to be noticed. The contestor introduced as a witness on the trial one Charles A. Patterson, who testified that he was thirty-two years of age; that the time of the October election, in 1864, and for nine months or a year previous thereto, he lived in Franklin township, in said county of Johnson, and voted in said township at said election. He was then asked to state for whom he voted for the office of treasurer of said county. The counsel of Wheat objected to the witness answering the question for the reasons—

1. That the ballot of the witness was the best evidence.
2. Because the ballot of witnesses had been put in evidence by the contestor.
3. Because oral evidence is not admissible when recorded evidence is available.

The court overruled the objection and permitted the witness to testify that he voted for Ragsdale for treasurer, to which ruling of the court the defendant's counsel excepted. It was not claimed that the witness was not a legal voter of Franklin township.

The evidence was directed to the first ground of contest specified in the contestor's statement, filed with the auditor, viz: That before the votes given at Franklin poll were counted out, two hundred legal votes cast for him were abstracted from the ballot box at said poll, and two hundred and sixteen ballots with the name of Wheat upon them for Treasurer, were fraudulently substituted for those abstracted. The contestor sought to prove that the alleged fraud was perpetrated, by evidence that in fact two hundred more ballots, with his name upon them for Treasurer, were deposited in said box by legal voters of the township, than were found therein when the ballots were counted out, and that more ballots were found in the box when counted, than were actually cast at said election in that township. In other words, he sought to prove the alleged fraud by circumstantial evidence. This the appellant contends he could not do, because in the absence of direct evidence of the fraud, the ballots found in the box were the best evidence of how and for whom the electors voted.

We cannot sanction this position. Direct and positive proof of the alleged fraud would in such cases be more satisfactory to the court, or jury, trying the case. Such frauds, however, are seldom in the presence of those who are not participants in them, and if only direct and positive evidence were admissible, few if any of them would be brought to light We are not aware of any reason why frauds upon ballot-boxes, and thereby upon candidates for offices to be filled, may not as well be established by circumstantial evidence as frauds of any other character. The rights of interested parties, the purity of the ballot-box, and of our popular elections alike requires in such cases the greater latitude of evidence consistent with the fixed and well established rules of law.

The record before us discloses the fact that the ballots counted out at the Franklin poll were before the court, and if they were not, if the witness could identify his ticket, and it had not been destroyed, it would, when so identified, be the best evidence of the fact for whom he voted. We think, therefore, that the witness should have been asked if he could identify his ticket, and if he answered in the affirmative, search should have been made for it. If it could not be found, or if he could not identify it, then it would have been competent for him to state for whom he voted. We are aware that this course of examination would not probably be of but little practical importance, as but few voters would likely be able to identify their ticket, but when insisted upon it would be the proper cause of examination, as being in conformity with the strict rules of evidence.

The judgment is reversed with cost and the cause remanded for a new trial.

The appellant filed with the county auditor, within ten days after the appellee had been declared elected sheriff of Gibson county, a statement specifying the ground of contest of said election, verified by his affidavit.

On the hearing before the commissioners, a motion to dismiss the proceeding was sustained, and upon appeal to the circuit court, the appellee successfully renewed the motion. It is insisted in this court that the statement was not sufficient, because, while it disclosed the fact that the ground of contest was that the appellee had received illegal votes, it did not appear that the number of such illegal votes would, upon being taken from the total number of votes cast for the said appellee, "reduce the number of his legal votes below the number given for some other person." 1 G. & H. sec. 15, p. 318.

The averment is that the appellant received 1,719 votes, and that one Kirkman received 1,716 votes. It is also alleged that said Kirkman is entitled to be declared elected to said office, and would have been but for fraudulent and illegal votes cast at said election for James M. Ragsdale, in this, to-wit: That divers persons whose names to the contestor are unknown, who were not qualified voters of said county, and not entitled to vote at said election for said office of sheriff, did, on the day of said election, in the townships of Parker, Whiteriver, Washington, Wabash, Montgomery, Johnson, Barton and Columbia, cast illegal votes for the said James M. Ragsdale for the office of sheriff of said county. And the contestor further says, that had said illegal votes not been given for said James M. Ragsdale, the said Joseph J. Kirkman would have been duly elected sheriff of said county. We think the averment that Kirkman received 1,716 votes is in effect an allegation that he received that number of legal votes, it appearing that they were cast at a legal election, and received and counted as legal votes by the proper officers, and no question as to their legality being presented by the statement. As there were but three more votes counted for the appellee than were received by Kirkman, and it is averred that illegal votes were cast for the appellee in eight townships, it sufficiently appears that the illegal votes so received would, upon being taken from the apellee, have reduced the number of votes received below the number received by Kirkman. As this is the only ground urged by the appellee in support of the ruling of the court below, and as we think that ruling erroneous, the judgment will be reversed with cost, and the cause remanded with directions to overrule the motion to dismiss the proceedings. Nickols vs. Ragsdale, 28 Ind. 131.

A general election fixed by law is not vitiated by a failure of the officer to make the publication required by law. Carson vs. McPhetridge, 15 Ind. 327. Where the person voted for for the office of clerk, recorder, or auditor is ineligible by reason of having already served eight years in a period of twelve, the disability is one of which the voters are bound to take notice. Carson vs McPhetridge, 15 Ind. 327.

When the majority of the ballots at an election were for a person not eligible to the office under the constitution, it was held that the ballots for such ineligible person were ineffectual, and that the person receiving the greatest number of legal votes, though not a majority of ballots, was duly elected and entitled to the office. Gulick vs. New, 14 Ind. 93.

The duty of the board of canvassers and the clerk in making out the statement of the votes given the person elected, &c., are ministerial. They are not to consider any question relative to the validity of the election held, but to cast up the votes given for each person, from the proper election documents, and to declare the person who upon the face of the documents appears to have received the highest number of votes given, duly elected to the office voted for. Brown vs. O'Brien, 2 Ind. 423.

The statement of the cause of contesting the election of county auditor must, under the statute of forty-three, (1843) be verified by the affidavit of the person who contests the election, and such affidavit cannot be made before the clerk of the circuit court in vacation, he not acting as the clerk of the board of county commissioners. Allen vs. May, 8 Black. 310. And unless the affidavit has been sworn to before the proper officer, neither the commissioners nor the circuit court on appeal can proceed in the case. *Id.*

CHAPTER III.

AMENDMENT.

In the Commissioners Court a liberal rule as to amendments of pleading and process should be adopted. The code allows great latitude in this respect. And in a court of limited jurisdiction, where the evident object of its creation was to simplify the practice so as to enable those who are not skilled in law to transact their own business without the expense of employing attorneys, a generous rule ought to be established. But in no case should the board step outside of the plain rules marked out by the statute to accommodate the parties litigant. The statute is their guide and it should be followed by them. *The code provides* "If the court sustain a demurrer the plaintiff may amend by payment of the costs occasioned thereby.(*d*)

"Any variance between any pleading and a copy of a written instrument filed as to matter of description or legal effect, may be amended at any time as of course before judgment without causing a continuance."(*e*)

"In the construction of a pleading for the purpose of determining its effect, its allegations shall be literally construed with a view to substantial justice between the parties; but when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment."(4)

"No variance between the allegation in the pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been misled, that fact must be proved to the satisfaction of the court, and it must be shown in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as may be just."(*g*)

(*d*) 2 Res. by G. & H., p. 81, s. 53. (*e*) 2 Res. by G. & H., p. 104, s. 73. (4) 2 Res. by G. & H., p. 112, s. 90. (*g*) 2 Res. by G. & H., p. 114, s. 94.

"When the variance is not material, as provided in the last section, the court may direct the facts to be found according to the evidence, or may order an immediate amendment without costs."(*h*)

"Any pleading may be amended by either party of course at any time before the pleading is answered. All other amendments shall be by leave of court. A party amending shall pay the costs of leave to amend. When the trial is not delayed by reason of the amendment no other costs shall be taxed. When the amendment causes a delay during any part of the term, or to another term, the party amending shall pay the costs of such delay. No cause shall be delayed by reason of the amendment, excepting only time to make up issues, but upon good cause shown by affidavit of the party or his agent asking such delay."(*i*)

"The affidavit shall show distinctly in what respect the party asking the delay has been prejudiced in his preparation for trial by amendment. When the action is continued for such cause the party asking the delay shall file his pleading at such time as the court may direct."(*j*)

"The court may at any time, in its discretion, and upon such terms as may be deemed proper for the furtherance of justice, direct the name of any party to be added or struck out; a mistake in the name, description or legal effect, or in any other respect to be corrected, any material allegation to be inserted, struck out, or modified, to conform the pleadings to the facts proved when the amendment does not substantially change the claim or defense. The court may also, in its discretion, allow a party to file his pleading after the time limited therefor, &c."(43)

"When the plaintiff is ignorant of the name of the defendant such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered the pleading or proceeding may be amended accordingly either before or after the service of the summons."(44)

(*h*) 2 Res. by G. & H., p. 115, s. 95. (*i*) 2 Res. by G. & H., p. 117, s. 97. (*j*) 2 Res. by G. & H., p. 118, s. 98. (43) Act of 1867, p. 100, sec. 99. (44) 2 Res. by G. & H., p. 122, sec. 100.

"All writs and other processes authorized by the provisions of this chapter (article), shall be issued by the clerk of the court, and, except summonses, sealed with the seal of such court, and shall be served and returned forthwith, unless the court or judge shall specify a particular time for any such return. And no writ or other process shall be disregarded for any defect if enough is shown to notify the officer or person of the purport of the process. Amendments may be allowed, and temporary commitments when necessary."(45) For further information on this question the reader is referred to our notes.(46)

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(45) 2 Res. by G. & H., p. 320, sec. 736.

(46) A motion for leave to amend after the evidence has been heard, is addressed to the discretion of the court, and when neither the evidence nor the proper amendment are in the record this court can not say that the court below has observed its discretion. Shaler and another vs. Burkara, 10 Ind. 227.

The court may admit the parties to perfect their pleadings at any time upon the issues formed before the submission of the case to the jury, but it can not permit a party to amend so as to present a new issue after the evidence and argument has been heard. Kesstetter vs. Raymond, 10 Ind. 199.

The plaintiff in this case obtained leave to amend, and was ordered to file his amendment thirty days before the first day of the next term, but he filed it only ten days before that time. At that term upon rule granted, the defendant failed to plead to the amendment. Judgment for the plaintiff. No motion was made to strike the amendment from the files, nor was any exception taken. *Held*, as in our practice we have no rule day, no default could have been entered for failing to file the amendment according to the order, and the court might permit it to be filed afterward, and regard the question of time as waived. Smith and others vs. Governor and others, 9 Ind. 304. The record contains a bill of exceptions which shows that after the evidence was closed, the argument of counsel concluded, and before the jury retired, the plaintiff moved for leave to enter a *nolle prosequi* as to William and John Akin, it having been proved that they were minors under the age of twenty-one, and no guardian to answer for them having been appointed by the court, which motion, though resisted was sustained, and the plaintiff was permitted to enter the *nolle prosequi*, and in accordance with such entry to amend his complaint. Was the plaintiff's motion correctly sustained? The code says "The court may, at any time in its discretion, and upon such terms as may be deemed proper for the furtherance of justice, direct the name of any party to be added or struck out, * * * * when the amendment does not substantially change the claim or defense. * * * The motion to enter a *nolle prosequi* was, in effect, for leave to amend by striking out the names of the minor defendants, and in that view the provision to which we have referred seems to be broad enough to sustain the ruling of the court. * * * And it is obvious that the phrase *at any time*, in the connection in which it stands in the provision, was intended, in authorizing the court in the exercise of its dis-

cretion, to allow such amendments at any time before the jury retires. Trees vs. Eakin and others, 9 Ind. 554.

An improper amendment may be set aside, on motion, in the same court in which it was allowed Young vs. The State Bank, 4 Ind. 301.

A party may have the liberty granted him to amend his pleading. Ludlow vs. Kincaid, 1 Blackford 488.

A party may have leave to amend his pleading after the jury is sworn and before the cause is submitted, without placing on record the specific grounds on which his motion is based. Ostrander vs. Clark, 8 Ind. 211.

When the pleadings are defective in form only they are deemed to be amended in the Supreme Court. 9 Ind. 233.

Any defect in the process amendable below will be deemed to be amended in the Supreme Court. 9 Ind. 520.

A failure to enter default in the court below, and on appeal the amendment will be regarded as made. 10 Ind. 227.

An amendment to a complaint generally has relation to the time the complaint was filed; but this is not so when the amendment sets up a title not previously asserted involving a question upon the statute of limitations. 10 Ind. 183.

The plaintiff has a right at any time before his complaint is answered to amend his pleadings and to file additional paragraphs. 24 Ind. 253.

Section 53 of the code (2 G. & H. 81), which provides for the amendment of pleading after a demurrer has been sustained, seems not to be discretionary but imperative, and in the absence of sham or frivolous pleading a party should be allowed to amend. Ewing vs. Patterson, 35 Ind. 326.

Where a plea in abatement had been stricken out for want of verification by affidavit, after the jury had been sworn to try the cause, but before any further steps had been taken; *Held*, that it was too late for the defendant to ask leave to supply the verification. *Held*, also, that it was not necessary to re-swear the jury to try the remaining issue. Wilson vs. Pool, 33 Ind. 443.

CONTINUANCE.

The board no doubt may postpone the trial of any cause on their own motion on account of sickness of themselves or family, and for other important matters. The parties may by agreement postpone the trial to some future day. But a continuance by agreement of parties will be subject to the discretion of the board. If the defendant in a contested election case has not been served with process at least ten days before the day set for the trial of the cause it should be continued for service of process, on the defendant's motion, at the plaintiff's cost.(45)

Section 323 of the code provides: "Any court for good cause shown may continue any action at any stage of the

(45) 20 Ind. 486.

proceeding at the cost of the applicant, to be paid as the court shall direct."(46)

It will be noticed on reading the above section that it fixes no definite time when the motion for a continuance shall be made. But it provides that the court, for "good cause shown, may continue any action *at any stage of the proceedings*."

The matter is left at the sound discretion of the court. The board therefore should, in considering a motion to continue, take into consideration all the circumstances surrounding the case. Our Supreme Court, in the case of Detro v. The State, in commenting on the causes for continuance, says: "The motion for a continuance based upon affidavit of the party is addressed to the sound discretion of the court trying the cause, and the propriety of refusing it must depend to a great extent on the peculiar circumstances of each case. From the nature of the case the court trying, witnessing all the proceedings, and being from personal observation familiar with all the attendant circumstances, has the best opportunity of forming a correct opinion upon the case presented. The general principles relative to granting of continuances are well and clearly defined, but of necessity there is considerable latitude of discretion left to be exercised by the court. And if no general principle has been violated the presumption will be in favor of the action of the court. In so far as they are vested with discretionary powers they will be presumed to have been properly exercised until the contrary is shown."(48)

The words for *good cause*, as used in section 323, means something that will injure or prevent the party from having a fair trial. Hence, a party may have the trial postponed on account of sickness of themselves, some member of his family, or on account of the sickness of his principal attorney. But a continuance is seldom granted on account of the absence of an attorney.(49) And under some circumstances the death of a near relative has been held a good cause for continuance. But the most usual cause for a con-

(46) 1 G. & H., p. 198. (48) 4 Ind. 200; 26 Ind. 30; 6 Blackf. 426. (49) 19 Ind. 83.

tinuance is the absence of witnesses or material evidence. In order for a party to get a continuance on account of absent witnesses he must show by affidavit:

1. That the witness is competent to testify.(50)

2. The materiality of the evidence expected to be obtained,(51) and the facts showing the materiality of the evidence must be stated.(52)

3. "That the witness is absent and where he resides and the probability of procuring his testimony within a reasonable time.(51) And that his absence has not been procured by the act or connivance of the party, nor by others at his request, nor with his knowledge and consent, and what facts he believes the witness will prove, and that he believes them to be true, and that he is unable to prove such facts by any other witness whose testimony can be as readily procured."(52)

4. "That due diligence has been used to obtain the testimony, and the facts constituting diligence must be set out,(53) or else an excuse for the lack of diligence must be shown."(54)

The following form for an affidavit for an absent witness may be used:

STATE OF INDIANA, }
——— County, } ss:

Before the Board of Commissioners of ——— County.

JOHN SMITH *vs.* RICHARD ROE.

The defendant (or plaintiff, as the case may be,) in the above entitled cause being duly sworn, upon his oath, says that he can not safely go to trial at the present term of this (court) board owing to the absence of John Taylor a material and competent witness for this defendant in the above entitled cause. That the said John Taylor resides in —— county, Indiana. That this defendant expects to prove by the said John Taylor that (here set out the matter expected

(50) 16 Ind. 143; 7 Blackford 432. (51) Act of Reg. Sess. of 1865, p. 61. (52) 7 Ind. 160; 3 Blackf. 504; 10 Ind. 261. (52) Acts of Reg. Sess. of 1863, p. 61; 12 Ind. 525. (53) 15 Ind. 257; 16 Ind. 313. (54) 17 Ind. 239.

to be proved). That he believes said facts are true, and that he is unable to prove such facts by any other witness whose testimony can be as readily procured. That on the —— day of ———, 1870, he caused a subpœna to be issued by the county auditor of said county to the sheriff thereof commanding him to subpœna the said John Taylor to appear at this term of this court to testify on behalf of the defendant in this cause. A copy of said subpœna and the return of the sheriff thereon is attached hereto and made a part hereof, marked A. That the sheriff served said subpœna on the said John Taylor on —— day of ——, 187—. And that he believes that if this cause is continued for twenty days that he can procure the testimony of the said John Taylor. That the absence of the said witness, John Taylor, has not been procured by the acts or connivance of this defendant, or by others at his instance or request, nor with his knowledge and consent. That he makes this affidavit to procure justice and not for delay.

RICHARD ROE.

Subscribed and sworn to before me, this —— day of —— 1871. JOHN SHORT, Auditor.

It is provided by sections ninety-seven and eight, of the code, that "no cause shall be delayed by reason of an amendment, except only the time to make up issues, but upon good cause shown by affidavit of the party, or his agent, asking such delay."(56) The affidavit shall show distinctly in what respect the party asking the delay has been prejudiced in his preparation for trial, by the amendment.(57)

A continuance under these sections can only be granted on affidavit of the party, showing wherein he has been prejudiced in his preparation for trial.

In the case of Kirkpatrick vs. Holman, our Supreme Court held, that where a plaintiff sued the defendant on a

(56) 2 G. & H. p. 117. The withdrawal by the plaintiff, of a demurrer to a plea in bar, and then taking issue on the plea by replication, entitles the defendant to a continuance. 4 Black. 387. (57) 2 G. & H. p. 118.

written agreement for a stallion and a common account for price and value of horse sold and delivered by the plaintiff to the defendant, and aftewards the plaintiff amended his complaint, or rather filed a new and substituted complaint, the first paragraph of which was like the first paragraph of the original complaint; 2, set up an arbitration and award; 3, fraud in book account, that the court was right in granting the defendant a continuance on affidavit showing his surprise.(58)

But a continuance should never be granted under these sections unless the party applying shows, by his affidavit, that the adverse party has raised a new issue by reason of the amendment, and that he is not prepared to meet it, on account of absent witnesses, or any other fact.

The court may continue a cause for the purpose of taking depositions, when they may think that it is necessary to determine the rights of the parties.(58)

When an application is made for the continuance of a cause on account of the absence of a witness, if the adverse party will admit that the witness will testify to said facts as true, the cause should not be continued.(59) And if the motion is made on account of the absence of other evidence, if the other party will consent that on the trial the facts shall be taken as true, the cause cannot be continued.(59)

Great care should always be taken to get all the statutory requisites and essential matter in an affidavit for a continuance, because they cannot be amended like other insufficient pleadings.(59) The suppression of a deposition is generally a good cause for continuance.(60)

In all contested election cases the board can only continue the case for twenty days at a time.(61)

COSTS.

When an application is made for a continuance on ac-

(58) 25 Ind. 293; 24 Ind. 253; 9 Ind. 273. (58) 2 G. & H. p. 175; sec. 249. (59) Act Reg. Session 1865, 62. (59) Pence vs. Christman, 15 Ind. 258; Derkill vs. The State, 7 Ind. 338; 13 Ind. 49. (60) 10 Ind. 125. (61) 1 G. & H. p. 319, sec. 19.

count of absent witnesses or absent evidence, and granted, the cost is taxed to the applicant.

Where an application is made on account of surprise, cost is always taxed to the party whose act produces the surprise.

Continuances of the court costs is taxed to no one, but abides the result of the suit. The court has considerable latitude in the taxing of costs in continuances.

At common law many persons were held incompetent to testify. All parties to the suit, and all persons whose pecuniary interests were directly involved in the issue, were not permitted to testify. Persons defective in understanding, and all persons insensible to the obligation of an oath, were excluded as witnesses. Husband and wife were prohibited at common law from testifying for or against each other, in both civil and criminal cases; and they could not disclose any communications, made to each other during the marriage relation, whether called as witnesses "during that

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NOTES ON CONTINUANCES.—An application for a continuance cannot be repeated upon a second affidavit upon the same facts stated in the first. 12 Ind. 407; 13 Ind. 46; 14 Ind. 39.

The continuance of a cause may be set aside at the term at which it was granted, and the parties ordered to go to trial, if the court is satisfied that no injustice will be done to either party. 9 Ind. 480.

A continuance to obtain testimony is rightly refused when the facts sought to be proved are unimportant. 10 Ind. 40. The evidence proposed to be procured must be material. 12 Ind. 548; 14 Ind. 1; 11 Ind. 358.

It is material to impeach the character of the witness of the opposite party. 5 Black. 583.

If the absent witness is disinterested, the continuance will be granted, though there are interested winesses present, having a knowledge of the same fact. 5 Ind. 274; 24 Ind. 46.

Cost resulting from a continuance on account of the absence of a witness, should be taxed to the party to whom the continuance is granted. 23 Ind. 466.

Where the complaint is amended during term time, the defendant, upon proper affidavit of surprise, may be allowed a continance till next term. 25 Ind. 293; 24 Ind. 253.

An application for a continuance to obtain absent testimony should show the exercise of reasonable diligence to obtain it before.. 22 Ind. 236; 27 Ind. 108; 17 Ind. 239; 30 Ind. 395; 29 Ind. 508.

An affidavit for a continuance in which the affiant cannot state the name of the witnesses he wants, nor where they reside or can be found, is insufficient. 21 Ind. 236.

relation or afterwards."(60) Children under fourteen years of age, at common law, were presumed to be incompetent to testify. But this presumption might be overturned by evidence. And to test their competency or incompetency, the court before whom the trial was had was required to interrogate the witnesses, and if, on examination they were found to have sufficient natural sense and intelligence and to have been so instructed as to comprehend the nature and effect of an oath, they were permitted to testify, whatever their ages might be.(62) But if on examination the witness was found to be ignorant of the nature and obligation of an oath, the court could continue the cause until they could be instructed in reference to the same.(63)

Communication between clients and attorneys were also excluded. And this rule was so strictly adhered to that an attorney could not be compelled to disclose any communication received from his client, nor be compelled to surrender up any paper, or document, received from him, that was connected in any way with the business between them. But the common law made no distinction on account of race or color, and under its provisions any person of sufficient intelligence to testify was a competent witness, unless he came under some of the exceptions before enumerated. It is provided by the act approved May 31, 1852, section 1, subdivision 4, that the law governing this State shall be "The common law of England and the statutes of the British Parliament made in aid thereof, prior to the fourth year of the reign of James the first, (except the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and the ninth chapter of thirty-seventh Henry the eighth) which are of a general nature, not local to that kingdom, and not inconsistent with the first second and third specifications of this act."(15)

Thus we see that by the expressed action of our legislature the rules of the common law are in force in this State.

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(60) 8 Ind. 180; 13 Ind. 253. (62) 1 Greenleaf on Ev. secs. 337, 338. (63) 1 Greenleaf on Ev. sec. 367. (15) 1 G. & H. p. 415, sec. 4.

And unless its provisions in reference to witnesses have been abrogated by a subsequent act of our legislature it is still the law. The act approved March 11, 1867, provides that "every person of competent age may be a witness in any civil or criminal cause, or proceeding, and no person shall be disqualified as a witness, by reason of interest in the event of that or any other action, or because such person is a party in said action, or proceeding, other than criminal. Any person, party in a civil action may testify in his own behalf, or in behalf of any other party, or parties therein, and any one person, or party in a suit, may compel any other person or party therein, to testify under the same regulations as other witnesses may be compelled, and the interest in the suit of any witness shall be regarded only as to his or her credibility, and shall not affect his her competency. Persons insane at the time of examination, children under ten years of age, and incapable of properly understanding the facts about which they are examined, husband and wife as to matters for or against each other, or as to communications made to each other during marriage, except that the wife shall be a competent witness in case of prosecution against the husband for assault and battery upon the person of his wife, and except, also, that in suit by husband and wife jointly for an assault upon the wife, such wife shall be a competent witness to prove the assault and battery. Attorneys at law, as to confidential communications from a client, or advice given to such client; physicians, as to matters confided to them in the course of their profession; clergymen, concerning any confession made to them in the course of discipline enjoined by the church, shall not in any case be competent witnesses, unless by the consent of the party making such confidential communication. *Provided*, That in all suits where an executor, administrator or guardian is a party, neither party shall be allowed to testify as a witness, unless required by the opposite party, or by the court trying the cause, except in cases arising upon contracts made with executor, administrators or guardians of such estate, and in case where a party to a suit pending in any court in this State, whose deposition has been taken in

such suit and is on file in such court, dies, such suit is prosecuted by or against the executor or administrator of such deceased party, the opposite party shall be allowed to testify as witnesses on the trial of the cause on all material points and matters of fact embraced in the deposition, and on no other facts, and such deposition may be read in evidence by and on behalf of the representatives of such deceased party. And provided further, that in all suits by or against him, founded on a contract with, or demand against an ancestor, the object of which is to obtain title to, or possession of land or other property of such ancestor, or to reach or to affect the same in any way, neither party shall be allowed to testify as a witness as to any matter which occurred prior to the death of such ancestor, unless required by the opposite party, or by the court trying the cause, and the assignor of the plaintiff in any such suit where there has been an assignment of the cause of action, shall be deemed and held to be a party within this provision." (16)

This act substantially adopts the common law rule, except that it permits parties litigant, all parties at interest, to testify in civil cases. And allows one party to make a witness out of all other parties to the suit, either plaintiffs or defendants. It also fixes the age of competency at ten instead of fourteen years. And where a husband and wife are sued jointly concerning their joint property each can testify for himself or herself under this act.(17)

THE EXAMINATION OF WITNESSES.

After the board has settled the question as to the competency, the sheriff must call the witnesses and the auditor must administer to them the oath given on *ante*, p. 31; and on motion of either party the court will order the witnesses separated. This is a matter, however, that is left entirely at the discretion of the court. But it is the duty of the court to make the order, if it thinks that it is essential to the discovery of the truth or that justice will be promoted

(16) Acts of 1867, p. 225. (17) 29 Ind. 570.

thereby. And the board should seldom refuse to make the order for separation when requested.(69) If a witness remains in the house after an order of separation has been made the board may fine him for contempt, and may exclude his testimony; but the testimony of a witness in this country is seldom excluded for this reason. But parties to the suit who are intended as witnesses can not be excluded from the room.(70)

After the witnesses have retired from the room the sheriff will, at the request of the court, call the witnesses and they will be examined as called. The examination of a witness by the party calling him is called the examination in chief. The cross-examination is that made by the other party. In the examination in chief, as a general rule, the party is not allowed to ask leading questions. A leading question is one that suggests the answer to the witness, or one that can be answered by yes or no.(71) To this rule there are however some exceptions. In the preliminary examination, or what is more commonly called the introductory part of the examination in chief, the witness may be asked leading questions. When an immaterial question must of necessity be asked, in order to get at a material one, then the question may be put in a leading form. And when the witness is not of the party's own calling(72) he may be asked leading questions; or if he appears hostile to the party calling him, such questions can be asked. And when a witness is called to contradict what a party said at a certain time, he may be asked the question directly, did he say so? or was that said? referring to the matter, instead of asking him what was said.(73) A witness can only testify to such facts as are within his own knowledge, but he should be allowed to refresh his memory by reference to memorandums or other writings that he has made, or which he knows to be genuine.(74) As a general rule the witness should be requested to state the facts portrayed by him in as clear, pre-

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(69) 1 Greenleaf's Ev., pp. 504-5; McDonald, p. 120; 6 Blackf. 50; 2 Ind. 435. (70) 26 Ind. 386. (71) 1 Greenleaf's Ev., sec. 434; McDonald, p. 120. (72) 29 Ind. 198. (73) 1 Greenleaf, p. 508, sec. 335. (74) 4 Ind. 156; 5 Ind. 133; 5 Wendle 301.

cise language as possible. But this rule does not require him to speak with that degree of certainty as to exclude all doubts in his mind. If his mind is strongly impressed with the facts but his recollection is not clear and certain, his evidence should be admitted.(75) As a general rule, a witness can not give his opinion upon questions of fact. But there are exceptions to this rule.

The opinion of any witness can be given as to the identity of a person or to one's hand writing. And a witness not an expert, who knows facts personally, may give an opinion in matters requiring skill, stating also the facts on which he bases his opinion.(76) And where a person is skilled in a certain branch of science, when the point at issue involves questions of fact connected with that science, the opinion of the expert is admissible.(77) But one's opinion as to a person's legal or moral obligation, or how another would probably act if certain influences were brought to bear upon him, can never be admitted.

After a party has finished his examination in chief, the opposite party will then be permitted to cross-examine him. In cross-examinations leading questions may be put to the witness.(78) As a general rule the cross-examination must be confined to the subject matter of the examination in chief.(79) But as cross-examinations are only allowed for the purpose of getting the witness before the court or jury in his true light, great latitude should be allowed for the purpose of testing his memory, the purity of his principles, skill, accuracy and judgment, so as to enable the court or jury to judge of the weight that should be given to his testimony, and his feelings towards the parties; and all other questions of a kindred nature that are calculated to overturn and destroy the coherency of his evidence, provided the same has been fabricated,(80) may be asked. No questions collateral to the main issue can be asked for the purpose of impeaching or contradicting the witness. If new

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(75) 4 Ind. 156; 5 Ind. 133; 5 Ind. 92; 23 Ind. 37. (76) 4 Blackf. 293; 10 Ind. 120 and 551; 5 Blackf. 217; 30 Ind. 235. (77) 18 Ind. 329; 5 Blackf. 217; 14 Ind. 450; 12 Ind. 324. (78) 12 Ind. 324. (79) 12 Ind. 256; 29 Ind. 454. (80) 5 Mett. 48; 7 Mett. (Mass.) 266.

facts arise upon the cross-examination the witness may be re-examined as to it by the party who called him, and he may be asked to explain any part of his cross-examination, or any apparent inconsistency between his direct and cross-examination. After the plaintiff has finished the examination of his witnesses and the introduction of his evidence, the defendant will then be permitted to call and examine his witnesses; and in the introduction of his evidence he will be confined to the same rules that governed the plaintiff in the examination of his witnesses; and they will be subject to cross-examination and re-examination like those of the plaintiff.

IMPEACHMENT.

A witness can be impeached in several ways:

1. By showing that he has made former statements out of court different from one he has made under oath. But in order for you to do this you must lay what is called the foundation. This you can do by asking him the question if he did not state to A or B at a certain place (mentioning place and fixing the time that he should have made the statement), and if he answers that he did not, or that he don't recollect, you can then show the statement.(81) But where a witness has been impeached by showing his statement out of court in conflict with those he has made on the trial, the opposite party may, for the purpose of upholding the character of his witness, introduce testimony to show that he has made statements out of court in harmony with those he has made on the trial.(82) And where testimony is introduced of a contradictory nature either or both parties may uphold their witnesses by showing their general character for truth and veracity in the neighborhood in which they live, is good.(83)

2. And you may also impeach a witness by showing that his general reputation for truth and veracity in the neighborhood in which he lives is bad. But in your inquiries

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(81) 8 Ind. 314; 5 Blackf. 217; 14 Ind. 139; 15 Ind. 173; 28 Ind. 285; 13 Ind. 434; 2 G. & H., p. 172, at bottom. (82) 28 Ind. 285; 29 Ind. 555; 1 Greenleaf's Evidence, sec. 469.

into his reputation among his neighbors you will be confined to that time, or the time of the examination, as a general rule. And this is based upon the principle of reformation. It is generally conceded by all that men may reform; therefore, a man may have had a bad character last year for truth and veracity but from some cause may have repented and reformed, and this year have established by his honest dealing and upright conduct a good reputation for truth and veracity among his neighbors. It will be seen at once, then, the importance of a strict adherence to this rule.(82) But to this rule there are some exceptions. Where a witness has just moved into a strange neighborhood and has not been there a sufficient length of time for the people to become acquainted with his character, or to establish a reputation, his reputation in the neighborhood where he last resided may be shown. But before this can be done the party offering the impeaching evidence must show such a state of facts to exist before he will be permitted to introduce his evidence to that effect.(83) There are some other exceptions, but the above we think will illustrate the rule.

3. A witness may be impeached by showing what he said on a former trial. To do this you must ask him if he did not testify as a witness at ——'s former trial. If he answers this affirmatively, you must then ask him if he did not state at that time that ——, &c.; and if he answers no, you can then prove what he did say.(85) A party will not be permitted to impeach his own witness by "evidence of bad character, unless it was indispensable that the party should produce him, or in case of manifested surprise, when the party shall have this right." "But he may in all cases contradict him by other evidence, and by showing that he has made statements different from his present testimony."(86) When a witness has been examined in chief and his statements are contradicted by other witnesses, he can not be recalled to repeat what he said on his former examination.(87) A party may introduce his evidence in any

(82) 1 Blackf. 1; 3 Ind. 70; 27 Ind. 381; 19 Wend. 190. (83) 27 Ind. 383; 26 Ind. 165. (85) 8 Wendle 595; 13 Ind. 34; 16 Ind. 238; Bicknell's Civil Pr. 242. (86) 2 G. & H., p. 172, sec. 244; 14 Ind. 589. (87) 27 Ind. 383; 26 Ind. 165.

way he pleases; but to do this he must show that it is relevant;(88) and in the production of his evidence he should be held to the following rules:

Rule 1. "That the evidence must conform to the allegations and be confined to the point at issue."

It becomes a matter of importance under this rule to know what the word issue means. An issue is formed when one party alleges that a certain fact is true and this is denied by the other; or it may be defined to be "a single, certain and material point, deduced by the pleading of the parties which is affirmed on one side and denied on the other.(83) Then if there is an affirmative allegation of material matter on one side and this is denied on the other this would raise a material issue. An immaterial issue should be disregarded by the court, and no proof should be introduced upon it by either party.(84) To illustrate—Suppose that A sues B on a covenant of warranty, and alleges that B sold him the land and warranted it to be clear, free and unincumbered, and that the same was not unincumbered but that it was incumbered, and that B knew at the time of the conveyance that it was incumbered. B denies the allegations; the issue as to whether B knew that the land was incumbered or not would be an immaterial one, and if proof was offered upon this point it should be rejected. No evidence should be received on the trial of any cause which does not in some way establish some "reasonable presumption or inference as to the principal facts or matters in dispute.(87)

Rule 2. "That it is sufficient if the substance only of the issue be proved."

Under this rule a party will recover if he succeeds in establishing by the preponderance of the evidence the substance of the allegation set up in his pleading. To illustrate—Suppose D sells G a horse, for which G promises to pay him one day after the sale one hundred dollars for said horse; G fails to pay for the horse at the time agreed upon

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(88) 4 Blackf. 174; 7 Ind. 140; 4 Ind. 275. (83) 1 Greenleaf, —, Bouvier's Dictionary. (84) 1 Greenleaf, —. (87) 1 Greenleaf's Ev., sec. 52; 13 Ind. 434. (88) 1 Greenleaf, sec. 50.

and D sues him for the value of the horse, and in his complaint he alleges that on the 25th day of December, 1870, he sold G a certain iron gray horse, in Vermillion county, Indiana, and that he was a good work horse, &c., for which G agreed to pay him one day after the sale one hundred dollars, &c.; G comes in and pleads the general denial. If D can show that he sold G the horse any time within six years, and he was to pay him one hundred dollars for him, this would entitle D to recover, because the substance of the issue is the sale and price of the horse. It is provided by section 95 of our statute that "when a variance is not material * * * the court may direct the facts to be found according to the evidence, or may order an immediate amendment without costs."(90)

Rule 3. That the "burden of proving a proposition or issue lies on the party holding the affirmative."

Under this rule he who alleges a certain statement as a fact must, if it is essential to his recovery, establish that allegation by the preponderance of the evidence. To illustrate—Suppose that in a contested election case the plaintiff was to allege that there was a certain amount of illegal votes cast at the election for the defendant, &c.; here the plaintiff would have to prove the allegation as alleged if it was denied. And if the defendant sets up affirmative matter in his answer under this rule he must, if it is denied, establish it by the preponderance of the evidence, otherwise it will avail him nothing. This rule requires each party to establish by proof all the allegations of affirmative matter by them set up. And where the plaintiff grounds his right of action on a negative allegation, he must, as a general rule, prove that negative.(91)

But to this rule there is an exception: Where the subject matter of a negative allegation lies almost exclusively within the knowledge of the other party. In such case the negative averment will be taken as true, unless it is shown to be untrue by the other party. To illustrate, a party is indicted for selling liquor by the small without license;

(90) 2 G. & H., p. 115. (91) 28 Ind. 272; McDonald Treat. 127; 1 Greenleaf, sec. 83.

and it is averred in the indictment that the defendant did sell to John Jones in less quantity than a quart at a time, to-wit: one gill of whiskey, he not then and there having first procured a license from the board of commissioners, &c., to sell and barter, &c. Under this averment the State, in order to make out her case, would only have to show that he sold the whisky as alleged, to Jones, and if the defendant, at the time of the sale, had license to sell, he must establish this by his proof.(92) He, under such circumstances, is considered as holding the affirmative on that issue.

Rule 4. *The best evidence must be produced.* This rule is adopted for preventing fraud, and for the purpose of having every act of the parties to stand before the court, or jury, in their true light and character. Experience has established the fact that men who are engaged in litigation are inclined to keep back all the evidence they think will injure their cause. And so firmly is this principle interwoven into the jurisprudence of this country, that the party who attempts to establish the facts in his case by secondary evidence raises a presumption of fraud against himself.(96) To illustrate, A and B make an agreement and they reduce that agreement to writing; A sues B on this agreement, and on the trial he attempts to show its contents by parol; this would raise a presumption of fraud against A, and the evidence would be excluded.

In the case of Wheat vs. Ragsdale, our Supreme Court held that where a witness was called to prove that he cast a ballot for a certain person at an election, that if his ticket could be found and identified by him, that it would be the best evidence of that fact, and that until its absence was shown in the regular way that no other evidence should have been received in reference to that fact.(97) Questions which frequently arise under this rule lead into what is familiarly known as primary and secondary evidence. Primary evidence means the first and the best evidence. It is that which affords the greatest certainty of facts mentioned or set out in the pleadings. And until it is estab-

(92) 28 Ind. 272; 1 Greenleaf, sec. 179. (96) 1 Greenleaf, sec. 82. (97) 27 Ind. 191.

lished that primary evidence is out of the party's power, he cannot introduce secondary evidence to establish his case. All contracts required to be in writing by the statute of fraud must be proved by documentary or written evidence.(98) But all rules governing the production of evidence are adopted for practical purposes in the administration of justice, and they must be so applied as to promote the ends for which they were intended. Therefore the rule above laid down is subject to some exceptions; and one of these exceptions is for the purpose of accommodating the public. By reason of this exception a party may, on the trial of a cause, show by parol evidence that a person has notoriously acted as a public officer, and this will raise a presumption of his official character, without producing his appointment, or commission.(98)

HEARSAY.

On the trial neither party should be permitted to establish the allegations in their pleadings by hearsay evidence. Hearsay evidence is that "kind of evidence which does not derive its value solely to the credit to be given to the witness himself, but rests in part upon the veracity of some other person." Suppose that A tells B that he was not a legal voter at the October election, 1870; B tells C that A had told him this fact; A is indicted for illegal voting; C would not be allowed to come in and testify that B told him that A said that he was not a legal voter at said election, because it would be hearsay.(99) But the court should be careful to discriminate between hearsay and other evidence, or else they may exclude legitimate evidence. A rule upon this point is this, that when the fact that a "communication was made, and not its truth or falsity is the point at issue, any one who heard the words spoken may testify.(100) So when the feelings of an individual are the question at issue, the expressions of that individual, made at the time, are legitimate and proper evidence, and whether they were made to deceive and mislead others, is a question

(98) 1 G. & H. p. 348. (98) 5 Black. 390; 1 Greenleaf, sec. 83. (99) 1 Greenleaf Ev. sec. 99. (100) 1 Greenleaf, sec. 99.

for the jury or court trying the cause to determine. The facts of birth and marriage, descent and relationship, may be proved by hearsay evidence.(101)

And when a transaction is introduced, the whole should be admitted; all the circumstances constituting what is called the *res gesta*, should be portrayed to the court. But in order to admit these facts, they must have been in some way so connected with the main transaction which is under consideration, as to show its character.(102) Where several persons have formed a conspiracy, after you have established this fact, the declarations of each member becomes a part of the *res gesta*, and can be given in evidence against the whole.(103) The act and declaration of each member of a partnership can be given in evidence against the firm. (104) The declaration of an agent, made at the time of the transaction, is considered a part of the *res gesta*, and can be given in evidence against the principal. But before you will be permitted to introduce the declarations of an agent in evidence, you must first establish the fact that he was an agent.(105)

But there are several cases in which hearsay will be admitted. 1. Where the facts to be proven relate to public and general interest. So facts in relation to ancient possession, declarations against interest, what a deceased witness said on a former trial, and some others of a miscellaneous character.(106)

ADMISSIONS.

If a party to a suit admits certain facts to be true, and they are against him, they can always be given in evidence by his adversary. And when two or more have a joint interest in the matter in litigation, the admissions of one, in the absence of fraud, would be binding on all the parties in interest. But before declaration of a joint party can be received, the party offering the evidence must show that

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(101) 1 Greenleaf Ev. sect. 99. (102) 1 Greenleaf, sec. 108; 29 Ind. 249. (103) 18 Wend. 353. (104) 1 Greenleaf, sec. 112. (105) 13 Ind. 258; 3 Black. 436; 5 Ind. 286, 289; 26 Ind. 165; 25 Ind. 31; *id.* 185; 2 Ind. 332; 7 Wend. 281. (106) 1 Greenleaf, sec. 156; 14 Ind. 573; Becknell's Ev. p. 161;

the parties were, at the time the declaration was made, holding joint interest in the matter in dispute.(107) The admission of the wife can be given in evidence against the husband, if at the time she made the admission she was acting as his agent.(108) Where one claims real or personal property by title, the declaration of the grantor, while he was in possession of the same, in disparagement of his title, can be given in evidence against his immediate vendee, in a suit between the vendee and another.(109)

Owing to the fact that persons are apt to misunderstand what another said about a particular transaction, or event, admissions should be received with great caution, and are generally considered the weakest kind of evidence.(110)

Parol evidence should never be received to vary the terms of a written agreement. Parol agreements made before or contemporaneous with a written agreement, cannot be introduced to vary the terms of such agreement. The entire agreement is conclusively presumed to have been reduced to writing by them, and all former contracts and agreements are merged in the written contract.(111) It is the duty of the court to interpret every written instrument, to ascertain from the instrument itself what the parties intended, and to do this he must give each word its plain, ordinary and popular signification.(112) And to enable the court to arrive at a correct conclusion as to the meaning and intention of the parties, as expressed in the instrument, he can call to his aid all contemporaneous writing made between the parties relating to the same subject. But it sometimes happens that instruments are so unskillfully drawn that it is almost impossible to interpret them correctly, owing to certain ambiguous phrases which the parties have used. These ambiguities are of two kinds. Ambiguities latent and ambiguities patent. Ambiguities latent

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(107) 1 Greenleaf, s. 177. (108) 8 Black. 240; *id* 22; (109) 3 Ind. 471; 6 Ind. 152; 11 Ind. 347; 5 Ind. 444; 5 Black. 220; 6 Black. 439; 6 Ind. 152; 18 Ind. 343. (110) 1 Greenleaf, s. 100. (111) 23 Ind. 212; 28 Ind. 502; 8 Ind. 79; 7 Black. 432; 1 Black. 191; 5 Black. 18; *id.* 272; 6 Black. 183; 4 Ind. 377; 8 Ind. 364; *id.* 417; 9 Ind. 572. (112) 11 Ind. 273; 14 Ind. 499; 25 Ind. 256; 15 Ind. 59; 20 Ind. 389.

are something that appear certain from the instrument and without ambiguity, but are rendered uncertain by something arising outside of the instrument. To illustrate, suppose that John Smith dies and leaves a will, and in that will he gives to his niece, Maggy Smith, a certain piece of land, and it turns out that he has two nieces by that name; this would be an ambiguity latent, and in order to arrive at a correct conclusion upon the point as to who the testator intended, the court could call to its aid all the outside circumstances and facts connected with the case.(113) Ambiguities patent are those that appear upon the instrument itself. If an instrument is gotten up so informal as to convey no idea of the intention of the parties, or so that it could not be understood, this would be an ambiguity patent, and could not be explained by parol evidence.(114)

On the trial of a cause there are some things that courts will take notice of without proof. They will take notice of the existence of nations; also, of the law of nations; also of the seal of a notary public; also of the course of time and seasons, the days of weeks and months, seed time and harvest; also of the meaning of words in the English language; also the extent of the territory of this State and of the United States; also of the local divisions of the country into States, counties, cities and towns, but not of their precise boundaries, further than they may be described by a public statute.

They will not take notice of the changes of the common law. They will take notice, without proof, of stated days of general political elections; also of the sitting of our our legislature and its usual course of business; also matters of public history; also of the political constitution and form of their own government and its political agents. (108)

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(113) 1 Greenleaf; 29 Ind. 574. (114) 1 Greenleaf, s. 297. (108) 27 Ind. 281; 5 Ind. 8; *id*, 13; 1 Greenleaf, secs. 56, 57, 58; 27 Ind. 233; 13 Ind. 235; 8 Black. 508; 5 Ind. 8, 13; 16 Ind. 241; 15 Ind. 42; 13 Ind. 235; 4 Ind. 516; 5 Ind. 77; 13 Wend. 311; 14 Wend. 507; 12 Ind. 102; 1 Ind. 24; 2 Ind. 437; 12 Ind. 330.

DEPOSITIONS—HOW TAKEN.

But it sometimes happens that witnesses that parties litigant wish to establish certain facts by on the trial of a cause, are non-residents of this State, or residents of some county other than the one in which the suit is pending, or an adjoining county, or are sick, or are laboring under some other disability. In such case you must take their depositions. The statute on taking depositions is as follows:

CHAPTER 12.—*Depositions and Written Evidence.*

SEC. 245. Depositions of witnesses, taken within or without the State, may be taken according to the regulations hereinafter provided, before any judge, justice of the peace, notary public, mayor or recorder of a city, clerk of a court of record, or commissioner appointed by the court to take depositions. But depositions shall not be taken before any person being of kin to either party, or interested in the action.

SEC. 246. A party wishing to take depositions, shall give notice to the adverse party, if there be only one person; if there be several, to any one of them who is a real party in interest, his agent or attorney. Such notice shall specify:

First. The cause or matter in which the deposition is to be used.

Second. The court or tribunal in which the trial is to be had.

Third. The time and place of taking the deposition.

SEC. 247. The adverse party shall be allowed a reasonable time to travel from his usual place of abode to the place of taking the deposition, by the ordinary route of travel, exclusive of the day of service, the day of taking the deposition, and intervening Sundays. If served on an attorney or agent, a reasonable time shall be allowed him to communicate the same to the party.

SEC. 248. The notice may be served in the same manner and by any person authorized to serve a summons for a witness. If neither the party nor his agent or attorney reside in this State, the notice may be filed in the clerk's office, or

published three weeks successively in the county in which the suit is pending.

SEC. 249. In all actions the court may order the taking of depositions, whenever deemed necessary to determine the rights of the parties, or to expedite the trial of causes, and may, if necessary for that purpose, order a continuance until the next term.

SEC. 250. In all actions depositions may be taken by either party in vacation, immediately after the service of the summons, without an order of court, and, in term time, by the agreement of the parties. They may be used on the trial of all issues in any action in the following cases:

First. Where the witness does not reside in the county, or in a county adjoining the one in which the trial is to be held, or is absent from the State.

Second. When the deponent is so aged, infirm or sick as not to be able to attend the court, or other place of trial, or is dead.

Third. When the depositions have been taken by the agreement of parties, or by the order of the court trying the cause.

Fourth. When the deponent is a State or county officer, or a judge, or a practicing physician, or attorney at law, and the trial is to be had in any county in which the deponent does not reside.

In either of the foregoing cases, the attendance of the witness can not be enforced.

SEC. 251. A witness is not obliged to attend for examination upon a deposition in any other county than that of his residence, but may consent to do so.

SEC. 252. No deposition shall be read in evidence on the trial of a cause, if at that time the witness himself is produced in court, unless the deposition has been taken by the agreement of the parties, or by the order of the court.

SEC. 253. The officer taking the deposition shall have power to summon and compel the attendance of witnesses.

SEC. 254. The provisions of the last section shall extend to all officers and commissioners authorized to take deposi-

tions in this State, to be read in the courts of other States or countries.

SEC. 255. The deponent shall be first sworn by the officer to testify to the truth, the whole truth, and nothing but the truth, relating to the cause or matter for which the deposition is to be taken; and he shall then be examined by the party producing him, and then by the adverse party, and by the officer or parties afterwards, if they see cause.

SEC. 256. The deposition shall be written down by the officer, or by the deponent, or by some disinterested person, in the presence, and under the direction of the officer, and after the same has been carefully read to or by the deponent, it shall be subscribed by him.

SEC. 257. The officer shall annex a certificate to the deposition, stating the following facts:

First. That the deponent was sworn according to law.

Second. By whom the deposition was written; and if written by the deponent, or some disinterested person, that it was written in the presence and under the direction of the officer.

Third. Whether or not the adverse party attended.

Fourth. The time and place of taking the deposition, and the hours between which the same was taken; and the officer shall sign and attest the certificate, and seal the same, if he have a seal of office.

SEC. 258. The officer taking the deposition shall seal up the same in a sufficient paper envelope, and direct the same to the clerk of the court in which the action is pending, indorsing on the envelope the names of the parties and of the witnesses whose depositions are inclosed.

SEC. 259. When a deposition is offered to be read in evidence, it must appear to the satisfaction of the court that the cause for taking and reading it still exists.

SEC. 260. When a deposition is to be taken within the State, no commission shall be necessary for taking the deposition. When taken out of the State, the clerk shall, upon the request of the party taking the deposition, issue a commission to the officer or commissioner designated to take

the deposition. No order of court or affidavit shall be necessary to authorize the issuing of the commission.

SEC. 261. When the commission contains the name of the officer before whom the deposition is to be taken, his attestation, officially certifying the same shall be sufficient; but if the commission do not specify the name of the officer, and he have no official seal, his certificate shall be authenticated by the certificate and seal of the clerk or prothonotary of any court of record of the county in which the officer exercises the duties of his office.

SEC. 262. When the depositions are to be taken in a foreign country, they shall be taken pursuant to an order of the court under a commission, with such reasonable notice of the time and place of taking the same as the court shall require; and they shall be certified and returned by the commissioner in such manner as the court shall direct.

SEC. 263. Every deposition intended to be read in evidence must be filed in court at least one day before the time at which the cause in which the deposition is to be used stands on the docket for trial; or if filed afterwards, and claimed to be used on the trial, the adverse party shall be entitled to a continuance at the costs of the party filing the deposition, upon showing good cause by affidavit.

SEC. 264. Depositions, after being filed may be published by the clerk, at the request of either party, after giving the other, his agent or attorney, reasonable notice of the time of publication, or they may be published by the order of court on the motion of either party.

SEC. 265. Objections to the competency of a deponent, or to the propriety of any questions proposed to him or answers given by him, may be made at the time of taking his deposition, or in court, whether made at the taking of the deposition or not.

SEC. 266. All objections to the validity of any deposition, or its admissibility in evidence, shall be made before entering on the trial, not afterwards. But any deposition after the commencement of the trial, may be suppressed, if any matter which is not disclosed in the deposition appears, which is sufficient to authorize such suppression.

SEC. 267. When an action has been dismissed, and another action has been commenced for the same cause, the depositions taken in the first action may be used in the second, or in any other action between the parties or their representatives for the same cause; but it must appear that the depositions have been duly filed in the court where the previous cause was pending, and have remained on file from the time the action was dismissed until the time at which it was proposed to use them.

SEC. 268. Whenever any person shall make affidavit before any Circuit Court, or Court of Common Pleas, or judge thereof, or clerk of the court, that such person expects to be made a party in any action thereafter to be commenced, and that the testimony of a witness, whether residing within or out of the State, to be named in the affidavit, is material and necessary to the prosecution or defense thereof, the court or officer before whom the affidavit is made, shall order reasonable notice to be given to the party expected to be adverse to the applicant or to his attorney, that on the day and at the place in such notice to be expressed, the witness will be examined conditionally before such officer as shall be specified in the order.

SEC. 269. Upon proof that the notice has been given, either by personal service or advertisement, at least three weeks successively in some public newspaper published in the proper county, or one most convenient thereto, (when the person to be notified is not an inhabitant of the State,) being made to the officer authorized to take the testimony, he shall proceed to take and certify, seal up and return the depositions according to the rules provided for other depositions in this act.

SEC. 270. Every affidavit and order, and every deposition so taken and certified, shall, within thirty days after the deposition is taken, be filed in the office of the Clerk of the Circuit Court, or Court of Common Pleas of the county where the subject-matter of such expected suit may be situated. The clerk shall file said deposition, and it shall remain sealed until published by order of the court after commencement of such expected action.

SEC. 271. Upon proof of the death, insanity or absence from the State of such witness, or inability by reason of age or infirmity to attend, the deposition or a certified copy thereof by the clerk of the court where the same is filed, shall be admitted as evidence in any court in this State, in any cause between the parties named in the affidavit, or in any cause between persons claiming under either of said parties, and shall have like effect as if the witness had been personally present, and given oral testimony therein, saving the right of exception in all cases on account of the incompetency of the witness, or of any part of the testimony contained in the deposition.

SEC. 272. An unimportant deviation from any direction relative to taking depositions, shall not cause any deposition to be excluded where no substantial prejudice would be done to the opposite party.

It is provided in section 245, *supra*, that depositions shall not be taken before any person "being of kin to either party," or interested in the action. Under this section it is important to know what the words "of kin to either party" means, for our Supreme Court, in the case of Brady vs. Richardson, intimated that the whole human family are related proximately or remotely to each other.(105) And if the account of man's origin as given by Moses be correct, this proposition is certainly true; and unless the question has been settled by the rules of the common law, or by our legislature, this would be a question of great difficulty. But the legislature has settled the question beyond controversy, for the Act approved June 18, 1852, Section 1, Part II., provides that, "where a person is required to be disinterested or indifferent in acting on any question or matter affecting other parties, consanguinity or affinity within the sixth degree inclusive, by the civil law rule, or within the degree of second cousins inclusive, shall be deemed to disqualify such person from acting except by consent of parties."(104)

The word consanguinity, in section 1, *supra*, means relation by blood, and the word affinity means relation by mar-

(105) 18 Ind. 1. (104) 2 G. & H. 338; 18 Ind. 1.

riage. Under this section, if a person before whom a deposition is to be taken is of kin to either party by blood or marriage, in the degree of second cousins, this would disqualify the officer and render the deposition void on motion to suppress. But this objection can be waived by agreement of parties. And if one who was cognizant of the fact was to appear and examine witnesses before a person he knew was disqualified to act in that capacity by reason of relationship, and made no objection on that account, this might be deemed a waiver of the objection.

It is provided by section 246, *supra*, that the party wishing to take depositions shall give notice to the adverse party, if there be only one person, and if there be several to any one of them who is a real party in interest, to his agent or attorney, such notice shall specify:

1. The cause or matter in which the deposition is to be used.
2. The cause or tribunal in which the trial is to be had.
3. The time and place of taking the deposition.

This notice must be in writing. It need not state the names of the witnesses to be examined, nor the officer before whom the deposition is to be taken. It should disclose the place of taking the deposition with sufficient certainty so as to enable the adverse party to find the same without difficulty.(*b*) Below we give a form for notice:

STATE OF INDIANA, }
County of ———, } ss:

JOHN SMITH *vs.* RICHARD ROE.

Action pending before the Board of Commissioners of the County of ————.

The defendant in the above entitled cause will take notice that in the office of the Clerk of the Circuit Court, in the town of Paris, Edgar county, State of Illinois, between the hours of nine o'clock A. M., and four o'clock, P. M., on the 14th day of January, 1871, the plaintiff will proceed to take the depositions of divers witnesses to be read in evi-

(*b*) 17 Ind. 359.

dence on the trial of the above entitled cause, and the examination will be adjourned from day to day thereafter until the taking thereof is complete.

June 1, 1771. JOHN SMITH.

This section (as has been before mentioned) provides that where there is more than one party plaintiff or defendant, that any one of the real parties in interest, his agent or attorney, may be served with notice, and it will be good as to all. A real party in interest, under this section, is one who is legally and immediately interested in the matter of the suit.(10) To illustrate, suppose A sues B on a promissory note, which has been assigned to him by delivery by C. When A brings his suit he must make C a party defendant to answer as to the assignment, or to his interest in the subject of the action.(11) Here B would be the real party in interest, and a notice served on him to take depositions would be binding on C and all others who are parties defendant. It is provided by section 248 *supra*, that the notice may be served in the same manner, and by any person authorized to serve summons for witnesses. And it is provided by section 229, of the act approved June, 1852, "That summons my be served by the party, or any other person, or by the sheriff. The party or any other person than the sheriff, shall not be entitled to fees for services. Where the summons is served by the sheriff, his return is proof of the service; when served by any other person, the service must be shown by affidavit.(12)

The act approved June 18, 1852, section 35 provides that "The summons shall be served either personally on the defendant, or by leaving a copy thereof at his usual or last place of residence. An acknowledgment on the back of the process, or the voluntary appearance of the defendant, is equal to service.(13)

This section applies to summons for witnesses, they being served in the same way as the summons to the defendant. A notice to take a deposition may be served by the party,

(10) Vansantwood's Pleadings, p. 110. (11) 2 Res. by G. & H. p. 38, s. 6. (12) 2 Res. G. & H. p. 166. (13) 2 G. & H. pp. 60, 61.

or by any other person, or by the sheriff of the county. It can be served by reading it to the adverse party personally, or by leaving a copy at his last or usual place of residence. If a party has not been in this State for six months, if a copy left at his last place of residence in this State would be good service, provided he had not changed his domicile.(14) The copy left need not be a certified copy; it will be sufficient if a copy be left.(15) If the copy was of a different date, still it would be a copy.(16) But the most usual manner of getting service is by acknowledgment of service on the back, or at the bottom of the notice. The acknowledgment may be in the following form:

I acknowledge service of the within (or the above) notice. This November 1, 1870.

RICHARD ROE.

If the adverse party will voluntarily appear, this will be sufficient without notice.(17)

The time of service. It is provided by section 247 *supra*, that the adverse party shall be allowed a reasonable time to travel from his usual place of abode to the place of taking the depositions, by the ordinary route of travel, exclusive of the day of service, the day of taking the deposition, and intervening Sundays. If served on an attorney, or agent, a reasonable time shall be allowed him to communicate the same to the party. Under this section a party would not be authorized to take a deposition on less than three day's notice, no difference how close the adverse party may live to the place of taking the deposition, unless it is by agreement of parties. But the question of sufficiency will depend, to a great extent, on the surrounding circumstances. For what might be good notice in one case, might not be sufficient in another. And it is not a correct way of arriving at the sufficiency of the notice, to take into consideration the question of distance only. But the facilities or means for traveling should be taken into account. And for this purpose the board should take into consideration

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(14) 2 Ind. 54. (15) 26 Ind. 65; 5 Ind. 67. (16) 4 Ind. 618. (17) 2 Res. by G. & H. pp. 60, 61.

the geographical features of the country, and the natural and other means for traveling.(18)

Our Supreme Court, in the case of Manning et al. vs. Goshen, held that a notice given at Goshen, Elkhart county, Indiana, on the 20th day of December, to take depositions in the city of New York, on the 29th day of the same month, was sufficient time.(19) And in the case of Hipes vs. Cochran the same court held that notice given at Centreville, Wayne county, Indiana, on the 23d day of December to take depositions in New York on the 1st day of January following, was sufficient.(20) Before the country became so interwoven with railroads and canals, when the facilities for travel were only on horse-back and in wagons, a notice of nine days, exclusive of the day of service, intervening Sundays, and the day of taking the deposition, would not have been sufficient time. And owing to the peculiar privileges that some of the States and territories of our Union have over others for traveling facilities, a notice to take a deposition in one part or section of the country, might be sufficient as to time, while in another section, at an equal distance, a notice to take depositions on the same time would not be sufficient. And in determining the question of time, the board, if they are not already familiar with the facilities for travel, may hear proof, or make use of any other evidence from which they can obtain the desired information. They may use maps, or newspapers, or books for this purpose. The deposition of all witnesses living out of this State, and all witnesses living in any but adjoining counties in this State, may be taken on notice, including parties to the suit.(21) It is provided by section 249 that "in all actions the court may order the taking of depositions whenever deemed necessary to determine the rights of the parties, or to expedite the trial of the cause, and may, if necessary for that purpose, order a continuance until next term." And when the board is sitting as a court in special session, as

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(18) 13 Ind. 175; 27 Ind. 399. (19) 27 Ind. 399 (20) 13 Ind. 155. (21) 27 Ind. 387.

they do in all contested election trials, they would have to designate a day in the future (not more than twenty days) for them to meet, provided they wish to continue the cause for this purpose. And in contested election cases there is generally more reasons for the exercise of this power by the board than in almost any other cases, from the fact that it often happens that the witnesses are numerous, and scattered over a vast extent of territory so that it would be impossible to bring them all before the board. And it very frequently happens that in ordinary suits and proceedings before the board, that the parties' witnesses reside in a different, but adjoining county, from that where the trial is pending. Under such circumstances the board, if it deems it necessary for the promotion of justice, may order the taking of depositions of the witnesses, providing the parties litigant, or either one of them, makes application for such an order. As a general rule, where a witness whose deposition has been taken, appears in court, his deposition cannot be read in evidence. But to this rule there are two exceptions; 1. When the deposition has been taken by the agreement of parties. 2. When the deposition has been taken by an order from court.

The depositions of the following persons may be taken and read in evidence, no difference where they may reside:

1. Where the deponent is so aged, infirm or sick as not to be able to attend court or other place of trial, or is dead.

2. When the deponent is a State or county officer, or a judge, or a practicing physician, or an attorney at law, and the trial is to be had in any county in which the deponent does not reside.

In either of the above cases the attendance of witnesses can not be enforced. But before a deposition of the above named persons can be read in evidence it must appear to the satisfaction of the board trying the cause that the cause for taking the depositions still exists.(22)

On the taking of depositions the deponent is generally asked the questions as to his age, occupation and place of

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(22) Section 259, *supra*; 28 Ind. 296.

residence; and his answer to these questions generally raises a presumption that such facts as he has testified to are true; and if they show on their face the facts necessary to authorize the taking of their depositions, it would seem, from all their former precedents and rules of evidence, that this ought to be, *prima facie*, sufficient to admit all depositions of this kind to be read in evidence. When a condition of the body or mind is once established, that condition is presumed to continue until the contrary is shown. And we think that as the party who has taken the deposition of the witness has established the fact by the evidence of the deponent, that this ought to make a *prima facie* case in his favor and admit the deposition to be read in evidence, unless the adverse party could overturn this evidence by other proof.

Where the deposition of a witness has been taken who lives out of this State, and this fact is so stated by him in his deposition, it raises a presumption that will authorize the admittance of the deposition as evidence on the trial without further testimony as to that fact. But the presumption is a disputable one and may be overturned by other testimony.

When a deposition is to be taken in this State it can be done before any officer who is authorized to administer oaths for general purposes without a commission. But when they are to be taken out of the State the auditor must, on the request of either party, issue a commission to some person of the State where the deposition is to be taken, who is authorized to administer an oath for that purpose by the laws of the State in which he resides, authorizing him to take the deposition. The following form may be used:

STATE OF INDIANA, }
——— County. } ss.

State of Indiana to Thomas Smith, or any judge, justice of the peace, notary public, mayor or recorder of a city, clerk of a court of record, or commissioner appointed by the court to take depositions according to law, reposing full faith and confidence in your fidelity and faithfulness, you are hereby commissioned and authorized at the office of the

Clerk of the Circuit Court, in the town of Paris, Edgar county, Illinois, on the 14th day of January, 1871, between the hours of nine o'clock A. M., and four o'clock P. M., of said day, to examine, under oath or affirmation, to be by you first administered, on the part of the plaintiff, in a cause now pending before the Board of Commissioners of ——— county, State of Indiana, wherein John Smith is plaintiff and Richard Roe is defendant, as well on the part of the defendant as of the plaintiff, on all such interrogatories as may be asked them by the parties. *That you carefully write down such interrogatories and the answers* thereto, or cause the same to be done by the deponent or by some disinterested person in your presence and under your direction, and after the same has been carefully read to or by the deponents, respectively, you can then cause said witnesses to subscribe their names to each of their depositions. After which you will make out and attach to said depositions the following certificate:

STATE OF ILLINOIS, }
Edgar County. } ss:

I, ——, a ——— in and for said county and State aforesaid, do hereby certify that the above named deponents was (or were) by me first duly sworn (or affirmed, as the case may be) to tell the truth, the whole truth, and nothing but the truth in the cause now pending before the Board of County Commissioners of ——— county, State of Indiana, wherein John Smith is plaintiff and Richard Roe is defendant, that the foregoing depositions were (or was) all written by me (or by S. A., a disinterested person, in my presence and under my direction), and that the said deponents severally subscribed their respective names to the same (or name), after the same had been read over to them carefully (or by them), by me. That Richard Roe, the defendant, was (or was not) present at the taking of said depositions either in person or by agent or attorney. That the said depositions were (or was) taken at the office of the Clerk of the Circuit Court, in the town of Paris, Edgar county, State of Illinois, on the 14th day of January, 1871, between

the hours of nine o'clock A. M., and four o'clock P. M., of said day, agreeably in all respects to the annexed notice and commission.

In witness whereof I have hereunto subscribed my name and affixed my (official) seal on this 14th day of January, 1871. ——— ———, [SEAL.]

That after you have attached the above certificate to said deposition, that you sign the same and affix to your signature your official name and the seal of your office (or official seal); that you then put said depositions (or deposition) in a paper envelope with the notice and this commission attached to the said deposition, and seal said envelope, and indorse on the back of the envelope the name of the parties, ——— vs. ———, and the names of the witnesses whose depositions are inclosed, and direct the same to the *Auditor* of ——— county, at ———, Indiana, and forward the same to me with all possible speed.

In witness whereof I have hereunto set my hand and official seal this 2d day of January, A. D., 1871.

[SEAL.] ———, *Auditor* of —— county, Indiana.

But it sometimes happens that witnesses leave the United States after a cause of action has been commenced, or may reside in some foreign country; under such circumstances their depositions must be taken pursuant to an order of the court, under a commission, with such reasonable notice of the time and place of taking the same as the court shall require, to be certified and returned to the commissioners in such a manner as the court shall direct.

To enable you to get an order under such circumstances, you must apply to the board for an order authorizing you to take the same. The application had better be made on affidavit showing that the witness is competent, that his testimony is material, setting out the material facts, and his name, and where he resides, and the name of the county, district or town you expect to take the deposition in, and the name of the officer before whom the deposition is to be taken. The following form may be used:

STATE OF INDIANA, }
——— County. } ss:

Before the Board of Commissioners of —— County, Indiana:

JOHN SMITH *vs.* RICHARD ROE.

John Smith, plaintiff in the above entitled cause, being duly sworn, upon his oath says that he can not safely go to trial at this sitting of this court on account of the absence of James Ray a material and competent witness for this plaintiff. That he expects to prove by the said James Ray that one Seth Thomas, who voted at the Union precinct, in Helt township, ——— county, Indiana, for Richard Roe at the October election for the year eighteen hundred and seventy, was not at the time he so voted a resident of the State of Indiana. That the said James Ray, before the commencement of this suit, and ever since, resided in the city of London, in the kingdom of England. That he can not prove such facts by any other witness whose testimony can be as readily procured, and that he believes said facts are true. That the absence of the said James Ray has not been procured by the act or connivance of the plaintiff, John Smith, nor by others at his request nor with his knowledge and consent. He therefore asks the board to grant (this plaintiff) him an order authorizing him to take the deposition of the said James Ray before a commissioner to be appointed by this court, and that this court fix the time and place of the taking of the aforesaid deposition, and also specify the time that the defendant, Richard Roe, shall be notified of the taking of said deposition, and in what manner it shall be sealed up; and that this cause be continued a reasonable time, not to exceed twenty days, to enable him to procure the testimony of the said James Ray, which he believes he can do in fifteen days.

JOHN SMITH.

Subscribed and sworn to before me this 5th day of December, 1870.(57)

—— ——, *Auditor.*

(57) 2 G. & H., p. 177, sec. 262.

Take your affidavit and go before the board and present it, and move for a continuance to enable you to take depositions, and if the board shall be of the opinion that you have made out a good cause for a continuance, and there is a probability of your procuring the testimony of your witness in a reasonable time, they will cause an order to be entered of record authorizing you to take depositions.

Form for the record:

JOHN SMITH *vs.* RICHARD ROE.

Comes now John Smith, plaintiff in the above entitled cause, and shows by affidavit to the satisfaction of the board, that James Ray is a material and competent witness for him in this cause, and that he expects to prove by the said James Ray, that one Seth Thomas, who voted at the Union precinct, in Helt township, ——— county, Indiana, for the defendant Richard Roe, at the October election, 1870, was not, at the time he so voted, a resident of the State of Indiana; and that the said James Ray now resides in the city of London, in the Kingdom of England. It is therefore ordered by the board that the said John Smith be, and he is hereby authorized to take the deposition of the said James Ray, and that he give the defendant, Richard Roe, 20 days' notice of the time and place of taking said deposition, and that the deposition, when taken, shall be certified, sealed up and marked as depositions taken in this State are certified, marked and sealed up, and that the clerk of this court issue a commission to some officer authorized to administer oaths, resident of the city of London, in the Kingdom of England, authorizing him to take said deposition, and that this cause be continued until the 25th day of the present month. This December 5, 1870.

S,
R,
B, } Commissioners.

The auditor can use the form in ante p. 81 of this book. Every deposition intended to be read in evidence must

be filed in court at least one day before the time at which the cause in which the deposition is to be used, stands on the docket for trial. And if they are filed afterwards, and the party proposes to use them, his adversary will be entitled to a continuance for cause shown by the affidavit.(76) After you have filed your deposition with the auditor, if you desire to open it in vacation, you can do so by giving the adverse party reasonable notice of the time and place of opening the same.(77)

The following form may be used:

JOHN SMITH *vs.* RICHARD ROE.

Before the Board of Commissioners of ——— *County:*

The defendant in the above entitled cause, Richard Roe, will take notice, that on the 10th day of December, 1870, the plaintiff will, at the auditor's office, in the town of Newport, in said county, request the auditor of said county to open the deposition of James Ray, now on file in the auditor's office of said county, which deposition was taken in the above entitled cause. Said request will be made at one o'clock P. M. of said day.

This December 6, 1870. JOHN SMITH.

Serve the notice on the adverse party or his attorney, giving him a reasonable time to appear and resist said motion. The notice may be served by reading the same to the opposite party or his attorney, or by leaving a copy at their last usual place of residence. On the day set for the opening of the depositions, you must show to the satisfaction of the auditor that the adverse party has had notice. This may be done by affidavit or otherwise. After you have done this the auditor will be authorized to open the depositions. But a proceeding of this kind would be useless if you are aware of the contents of the deposition, because you can wait until court convenes, and then on motion get an order to publish all depositions on file in the cause.(115)

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(76) 2 Res. by G. & H. p. 178, s. 163. (77) 2 Res. G. & H. p. 178, s. 264. (115) Sec. 264 *supra.*

MOTION TO SUPPRESS.

If a deposition has not been taken according to the requirements of the statute, or contrary to the rules governing the production of evidence, you may move to suppress the whole or any part of the same. The most general reasons for suppressing depositions are—

1. On account of the insufficiency of the notice; that it was not sufficient as to time; that there was a defect in the service of the notice.

2. That the certificate of the officer is not in accordance with the requirements of the statute; and if the certificate differs much from the form given on ante p. — of this work, it will be bad on motion to suppress.

3. That the officer before whom the deposition was taken is of kin to the party taking the deposition, by consanguinity or affinity in the degree of second cousins inclusive.

4. That the officer before whom the deposition was taken, was not at the time of taking thereof, authorized to administer an oath to the witness.

5. That the witness was not competent to testify.

6. That the deponent is a resident of the county where the trial is to take place, or of an adjoining county of this State.

But it sometimes happens that a deposition is good in part and bad in part.(116) Under such circumstances you must move to suppress the questions and answers supposed to be defective. The most general reasons for suppressing questions and answers are—

1. That leading questions have been propounded to the witness.

2. That the testimony is irrelevant to the issues in the case.

These are only a part of the many reasons for suppressing depositions, and questions and answers. The court should exercise considerable care on motions to suppress depositions or any part thereof; for it is provided by section

(116) 21 Ind. 183.

272 *supra*, that "An unimportant deviation from any direction relative to taking depositions, shall not cause the depositions to be excluded, where no substantial prejudice would be done to the opposite party.(117) And before the court should sustain a motion to suppress a deposition on account of the irrelevancy of the testimony, it should make a careful survey of the whole case to be litigated, and ascertain as far as possible, the issues and points that will arise in the case. For it sometimes happens that a deposition is taken for the purpose of impeaching the character of a witness for truth and veracity, or for the purpose of contradicting some statement that some witness is expected to testify to on the trial. But in order to have your motion entertained by the court, you must make it at the proper time.

The motion to suppress, as a general rule, should be made before the commencement of the trial, but to this rule there are exceptions. All motions to suppress on account of defects which are apparent upon the face of the deposition must be made before the commencement of the trial; if not made before that time it will then be conclusively presumed that you waived the same.(118) And when you put in your motion to suppress a deposition, or any part thereof, you should press the court for a decision upon your motion, for if it fails to decide the question until the trial is commenced, it will be presumed that you waived the defect.(119) But a deposition, or any part thereof, may be suppressed if any matter not disclosed in the deposition appears which will authorize such suppression.(120)

You can make your motion orally, or you can put it in writing. But the point relied upon for suppression must be presented in your motion in as clear a light as possible.(121) But the better way is to put the motion in writing.

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(117) 15 Ind. 64; 22 Ind. 194; 8 Blackf. 215; 26 Ind. 456. (118) 8 Blackf. 215; 26 Ind. 456. (119) 20 Ind. 215. (120) 20 Ind. 215; 2 Res. by G. & H. p. 178, sec. 266, *supra*; 8 Blackf. 215; 15 Ind. 303. (121) 27 Ind. 531; *Id.* 399.

Form of Motion.

JOHN SMITH *vs.* RICHARD ROE.

Before the Board of Commissioners:

The defendant in the above entitled cause moves the court to suppress the deposition of James Ray, for the following reasons:

1. The certificate of the justice before whom the same was taken does not state whether the defendant was present at the taking of said deposition.

2. And that it fails to show that the deponent was first duly sworn according to law.

RICHARD ROE.

CHAPTER IV.

WRITTEN EVIDENCE.

Writings are divided into classes, public and private, or those of record and those not of record. But there is no difference in evidence between sealed and unsealed writings. We will first notice those instruments of writing that are of a public nature. It is provided in the statute that:

SEC. 273. There shall be no difference in evidence between sealed and unsealed writings; and every writing not sealed shall have the same force and effect that it would have if sealed. A writing under seal, except conveyances of real estate, or any interest therein, may therefore be changed, or altogether discharged by a writing not under seal. An agreement in writing, without a seal, for the compromise or settlement of a debt, is as obligatory as if a seal were affixed.

SEC. 274. The execution of an instrument is the subscribing and delivering it, with or without affixing a seal.

SEC. 275. Recitals in any written instrument shall have no greater effect than they have heretofore had in writings not under seal.

SEC. 276. The last three sections do not repeal or affect any statute of this State expressly requiring a seal to a deed or other instrument.

Of Documentary and other Written Evidence.

SEC. 277. The printed statute books of this State, and of the late territory north-west of the river Ohio, and the territories of Indiana and Illinois, purporting to be printed under the authority of said state or territories, shall be evidence in all courts and places of the acts therein contained.

SEC. 278. The printed statute books of the several States and territories of the United States, purporting to be printed under the authority of those States and territories; and any copy of any statute, or part thereof, contained therein, having attached thereto the certificate of the Secretary of State, under the seal of the State, certifying the copy to be complete and correct; that the statute book from which the copy is taken is deposited in the office of the Secretary, or in the State Library; and is by him believed to have been received under the authority of the State or territory purporting to have enacted the same; shall be presumptive evidence in all courts of the legislative acts, public or private, of those States or territories respectively.

SEC. 279. Copies of the proceedings and judgments of any justice or justices of the peace of any State or territory of the United States, certified by the justice or justices under his or their hands and seals, before whom the proceedings were had or judgments rendered, or their successors in office or other justices having legal custody thereof, that the same are true and complete copies of the proceedings or judgments, with the certificate of the clerk or prothonotary of any court of record of the county or district where said justice or justices shall hold his or their office or offices, certifying under the seal of said court that the justice or justices was or were at the time when the proceedings were had or judgment rendered, and when the copy was taken, duly commissioned and qualified to act as such, shall be admissible as evidence in any of the courts in this State.

SEC. 280. Copies of the proceedings and judgments of any justice of the peace of this State, certified under his hand and seal, or under the hand and seal of the justice who may have the legal custody thereof, as true and complete copies of such proceedings or judgments, shall be received as evidence in the several courts in this State.

SEC. 281. Certificates or instruments, either printed or written, purporting to be the official act of a notary public of this State, or any other State or territory of the United States, and purporting to be under the seal and signature of such notary public, shall be received as presumptive evidence of the official character of such instrument and of the acts therein set forth.

SEC. 282. The certificate of the Secretary of State, under the seal of State, stating the time when any act or acts of the General Assembly were deposited in his office, or deposited in the office of the clerk of any circuit court, or court of common pleas, in this State, as shall appear from the certificate or receipt of any such clerk, shall be admissible in all the courts of this State as evidence of the facts stated in such secretary's certificate.

SEC. 283. Exemplifications or copies of records, and records of deeds or other instruments, or of office books or parts thereof, and official bonds which are kept in any public office in this State, shall be proved or admitted as legal evidence in any court or office in this State, by the attestation of the keeper of said records, or books, deeds or other instruments, or official bonds, that the same are true and complete copies of the records, bonds, instruments or books, or parts thereof, in his custody, and the seal of office of said keeper thereto annexed, if there be a seal, and if there be no official seal, there shall be attached to the attestation the certificate of the clerk and the seal of the circuit court of the proper county where such keeper resides, that said attestation is made by the proper officer.

SEC. 284. The acts and proceedings of corporations may be proved by a sworn copy of the record of such acts and proceedings; the oath shall be made by the person having the legal custody of such records, and shall state that such

transcript is a true and full copy of the original, and that such original has remained unaltered from its date, to the best of deponent's knowledge and belief. Such sworn copies shall be received as evidence in all cases in which the original would be evidence.

SEC. 285. Every act of the legislature of any one of the States or territories of the United States, certified by the Secretary, and having the seal of the State or territory affixed thereto, shall be deemed authentic, and receive full faith and credit when offered in evidence in any court within this State.

SEC. 286. The records and judicial proceedings of the several courts of record, of or within the United States or the territories thereof, shall be admitted in the courts within this State as evidence, by attestation or certificate of the clerk or prothonotary, and the seal of the court annexed, together with the seal of the chief justice or one or more of the judges, or the presiding magistrate of any such court, that the person who signed the attestation or certificate was, at the time of subscribing it, the clerk or prothonotary of the court, and that the attestation is in due form of law; and the records and judical proceedings, authenticated as aforesaid, shall have full faith and credit given to them in any court within this State, as, by law or usage, they have in the courts whence taken.

SEC. 287. When notice is, in any action, proceeding or sale under execution,or other matter required by the provisions of law, to be given by publication in any newspaper, an affidavit of the printer, or any person in his employ, as a clerk or printer, of a competent age, annexed to a copy of the notice taken from the paper in which it was published, may be filed in the clerk's office by the person whose duty it was to cause the publication to be made; such affidavit must specify the county, the time when, and the paper in which the notice was published.

SEC. 288. The original affidavit and copy of the notice, filed pursuant to the provisions of the last section, and copies thereof, duly certified by the clerk, shall be presump-

tive evidence in all cases and before every court, of the facts contained in the affidavit.

SEC. 289. When any affidavit is taken in another State and certified by the officer or justice of the peace taking the same, under his hand and seal of office, if he have any such seal, and attested by the clerk of the circuit or district court, or court of common pleas of the county where such officer exercises the duties of his office, under the hand of the clerk and the seal of his court, the clerk also certifying that the officer or justice of the peace, is, by the laws of said State, duly empowered to administer oaths and affirmations, and take affidavits, every such affidavit shall be deemed sufficiently authenticated, and may be received and used in any of the courts of this State.

SEC. 290. The unwritten or common law of any other of the United States, or of the territories thereof, may be proved as facts by parol evidence, and the books of reports of cases adjudged in their courts may also be admitted in evidence of such law.

SEC. 291. The existence and tenor or effect of the laws of any foreign country, may be proved as facts by parol evidence; but if it shall appear that the law in question is contained in a written statute or code, the court may, in their discretion, reject any evidence of such law which is not accompanied by a copy thereof.

SEC. 292. The proof of the service of any process issued by the court, or of any notice required to be served upon any party, shall be as follows:

First. If served by the sheriff, his certificate thereof; or,

Second. By any other person, his affidavit thereof; or,

Third. In case of publication, a printed copy, with the affidavit of the printer, his foreman, or clerk, or of any competent witness.

Fourth. The written admission of the defendant. The affidavit or admission must state the time and place of service.

SEC. 293. The clerk shall endorse upon every paper filed in his office or in open court, and upon every process returned to him or to the court, except summonses, the date

of the filing and return; and the endorsement shall be presumptive evidence of the time of the filing and return.

And it is provided by the act approved March 6th, 1861, That the register, catalogue, tract-book, plat-book and description of lands, kept at any land office of the United States, located in this State, or at any office for the sale of Canal or Michigan lands, and copies thereof, duly certified as true and complete by their proper keeper, and copies duly certified by the Auditor of State, as true and complete copies from said original documents, or from copies of the same, legally deposited in the office of said Auditor of State, shall be admissible in evidence in civil actions in all the courts of this State, and shall be taken and held as *prima facie* evidence of the truth of their contents.

And it is provided by the act of Congress approved May 26, 1790, that the acts of the legislatures of the several States shall be authenticated by having the seal of their respective States affixed thereto: the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken.

That all records and exemplification of office books which are or may be kept in any public office of any State not appertaining to courts, shall be proved or admitted in any other court or office in any other State by attestation of the keeper of said record or books and seal of his office thereto annexed, if there be a seal, together with the certificate of the presiding justice of the court of the county or district,

as the case may be, in which such office is or may be kept, or of the Governor, the Secretary of State, the Chancelor, or the keeper of the great seal of the State, that the said attestation is in due form and by the proper officer, and the said certificate, if given by the presiding justice of a court, shall be further authenticated by the clerk prothonotary of the court, who shall certify under his hand and the seal of his office, that the said presiding justice is duly commisioned and qualified; or if the certificate be given by the Governor, the Secretary of State, the chancellor or the keeper of the greatseal, it shall be under the great seal of the State in which the said certificate is made. And the said record and exemplifications authenticated as aforesaid, shall have such faith and credit given to them in any court and office within the United States as they have by law or usage in the courts and offices of the State from which the same are or shall be taken.(122)

These two statutes being alike in many respects, we have given them together. But it has frequently been held by the supreme courts of the different states, that the act of Congress only applied to cases arising in courts of general jurisdiction,(123) and that a judgment of a justice of the peace was not within the meaning of the statutory provision. Hence the judgment of an inferior court of limited jurisdiction must be certified according to the provisions of our statute. It will be seen by reference to section 283 *supra*, that the certificate of the officer must show that the copy to which the same is attached, is a *a true and complete copy* of ——— &c.

Under this section our supreme court held, in the case of Tull vs. David, that the following certificate was insufficient:

"State of Indiana, Brown county: I, Thomas M. Adams, Clerk of the Court of Common Pleas of said county, hereby certify that the foregoing is a true transcript of the proceedings had in said cause, as appears of record in the

(122) Brightly's Digest of U. S. Laws, pp. 265, 266. (123) 1 Greenleaf's Ev. sec. 505; 5 Ohio 545; 3 Wend. 267.

book of my office. Given under my hand and official seal, this 18th day of April, 1864.

THOMAS M. ADAMS, Clerk.

The court held that the certificate should have been in the language of the statute, and said "a full, true and complete transcript."(124)

The following certificate was held sufficient under section 1 of act of 1861, *supra:*

"Auditor's Office, Indianapolis, April 27, 1841. I, Morris Morris, auditor of public accounts, do hereby certify that the foregoing list of lands is correctly transcribed from the tract on file in my office. M. MORRIS, A. P. A." (30 Ind. 306).

For the purpose of aiding the different county officers throughout the State, in discharging their duty in this respect, we have given different forms which can be used.

Certificate of the Auditor:

STATE OF INDIANA, }
Vermillion county, } ss:

I, J. T., Auditor in and for the county and State aforesaid, do hereby certify that the above and foregoing is a full and complete copy of the real estate and personal property listed and assessed to James Hand, and the taxes assessed on the same in Vermillion county, Indiana, for the year eighteen hundred and seventy-one, as appears from the assessment rolls as returned to me by the real estate appraisers of said county, and the assessor of Helt township in said county, on file in my office, and tax duplicate of said county for the aforesaid year, of all of which I am the legal custodian. In witness whereof I have hereunto set my hand and affixed my official seal. Done at Newport, this July 7, A. D. 1871.

[SEAL.] J. T., Auditor.

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(124) 27 Ind. 377; 25 Ind. 376.

To this should be attached the certificate of the Secretary of State, or of the Governor thereof, when the transcript is to be used in evidence out of this State.

Certificate of the Clerk:

STATE OF INDIANA, }
Vermillion county, } ss:

I, J. A. B., Clerk Circuit Court, in and for said county and State aforesaid, do hereby certify that the above and foregoing is a full, true and complete copy of the proceedings and judgment in the case of John Jones vs. Seth Thomas, as appears of record in my office, of which record I am the legal custodian. In witness whereof I have hereunto set my hand and official seal, this 7th day of July, A. D. 1871.

[SEAL.] J. A. B., Clerk.

If the transcript is to be used out of this State, there should be attached to this certificate the certificate of the Judge of the Circuit Court of said county.

The Judge's certificate may be in the following form:

STATE OF INDIANA, }
18th Judicial Circuit, } ss:

I, C. Y. P., Judge of the Circuit Court within and for the 18th Judicial District of the State of Indiana, do hereby certify that the above certificate and attestation of J. A. B., attached to the above record, is in due form of law, and is made by the proper officer, and the signature thereto appears to be genuine. And I further certify, that Vermillion county is in the 18th Judicial Circuit of the State of Indiana, of which circuit I am Judge, and that J. A. B., at the time he signed said certificate and attestation, to-wit: on the 7th day of July, A. D. 1871, was the Clerk of the Circuit Court of Vermillion county, Indiana. In witness whereof I have hereunto set my hand and seal, this tenth day of July, A. D. 1871.

[SEAL.] C. Y. P., Judge.

The above certificates of the auditor and clerk may be used for transcripts and documents to be used in evidence, either within or without the State.

But it sometimes happens that the adverse party has possession of certain documents that you may want to use in evidence on the trial of a cause.

The code provides:

SEC. 304. If either party at any time before trial allow the other an inspection of any writing, material to the action, whether mentioned in the pleadings or not, and deliver to him a copy thereof, with notice that he intends to read the same in evidence on the trial of the cause, it may be so read, without proof of its genuineness or execution, unless denied by affidavit before the commencement of the trial; if such denial be made of any writing not mentioned in the pleadings, the court may give time to either party to procure evidence when necessary for the furtherance of justice.

SEC. 305. The court or judge thereof may, upon motion, compel by order, either party to produce, at or before the trial, any book, paper, or document in his possession or power; the order may be made upon application of either party, upon reasonable notice to the adverse party, or his attorney,—if not produced, parol evidence may be given of their contents.

SEC. 306. The court, or a judge thereof, may, under proper restrictions, upon due notice, order either party to give the other, within a specified time, an inspection and a copy, of any book or part thereof, paper or document in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein; if compliance with the order be refused, the court, on motion, may exclude such evidence, or punish the party refusing, or both.

But these two latter sections apply only to documents which the party desires to use in evidence, and which are not referred to or made a part of the pleading.(125) At

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(125) 17 Ind. 142.

common law where the form of action or pleading gave the party notice to be prepared to produce a written instrument no other notice to produce is necessary.(126)

The party under these sections should have reasonable notice, and this must be governed by the circumstances of each case. When the paper designed to be used is in the possession of the adverse party who is in court, or when the paper is in possession of the opposite party so near where the court is sitting that it can be obtained without delaying the trial, and without material inconvenience to the party, a notice given after the trial had commenced is sufficient. But where, from the nature of the instrument, or from its connection with the cause, it may fairly be presumed to be in the possession of the party or his attorney in court, and the motion is made pending the trial, the party must affirmatively deny that he has the same in court, or a notice will be held good. Neither of the parties litigant, nor their attorney, can be compelled to leave court and go for papers or books.(126) And where the motion is made to obtain inspection of any document mentioned or referred to in the pleadings, and not for the purpose of using it in evidence, no notice is necessary.(127)

CHAPTER V.

THEIR TIME AND PLACE OF MEETING.

The act approved March 7, 1863, provides that "such commissioners shall meet at the court-house or auditor's office in each county on the first Mondays in March, June, September and December in each year; and in counties whose population is under ten thousand such commissioners may sit six days at such term; in counties whose popula-

(126) 17 Ind. 142; 13 Wend. 505; 4 Wend. 626, *id.* 623; 7 Wend. 198; 18 Ind. 111. (126) 13 Wend. 505; 4 Wend. 623. (127) 17 Ind. 142; 18 Ind. 111.

tion exceed ten thousand and is under thirty thousand, tney may sit nine days; but in counties whose population exceeds thirty thousand such commissioners may sit fifteen days if the business of the term requires it. The enumeration to be fixed by the last census of the United States, or the latest enumeration by the State."(128)

And it is provided by the act, approved March 7, 1863, that special sessions of the Board of County Commissioners of the several counties in this State may be called whenever the public interest requires it; first, by the county auditor; secondly, by the clerk of the circuit court, in case of the death or disqualification of the county auditor; thirdly, by the Recorder of the proper county, in case of the disqualification from any cause of both county auditor and clerk of the circuit court. And that six days' notice of such special session shall be given, unless in the opinion of the officer calling the same an emergency exists requiring a short notice, in that case the officer may fix the time at his discretion.(129)

Under this act it is the duty of these officers to call a special session of the Board of Commissioners of their county whenever they may think the interest of the county demands it. To do so they must issue to the sheriff of their county a summons commanding him to notify each member of the board of the time and place of their meeting. The summons is served in the same way as parties defendants are served, either by reading or leaving a copy at his last usual place of residence.

The following form may be used:

STATE OF INDIANA, }
Vermillion County. } ss:

To the Sheriff of said County, Greeting:

Whereas in my opinion the interest of Vermillion county demands that the Board of Commissioners of said county should meet in special session, you are therefore commanded to summons A, B and C, who now constitute said board,

(128) Act of 1863, p. 32. (129) Act of 1863, p. 19.

to appear and attend a special session of the Board of Commissioners of said county, to be holden at the court-house in Newport, Indiana, on the —— day of ———, 1871, to meet at the hour of nine o'clock, A. M., of said day, and then and there return this writ.

Witness my hand and official seal this —— day of ——, 1871.

[SEAL.] J. T., Auditor.

It is unnecessary to set out in the summons the object for which the auditor or other officer who calls the special session intends them to consider. After they meet in special session, if the interest of the county demands it, they may transact any business that the law authorizes them to do, and may adjourn from day to day until the business of the county that requires attention is disposed of and finished. The officer who calls them together is the sole judge of the necessity for a called session of the board, but the board after it is once convened in special session is the sole judge of the length of time they will sit, and of the business they shall transact.(130)

It is not necessary that the commissioners' record should show the call; it may be shown *aliunde.*(131) At all of their meetings the law makes it the duty of the county auditor to attend and keep a record of their proceedings, and he is authorized to administer all oaths necessary to be administered in business before the board.(132) The sheriff of the county shall also attend the meeting of such board, either in person or by deputy, and execute their orders.(131)

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(130) 24 Ind. 514; 28 Ind. 161. (131) 28 Ind. 161. (132) 1 Res. by G. & H., p. 249, sec. 7.

CHAPTER VI.

THEIR JURISDICTION.

As soon as the board is organized it becomes a body corporate and politic, by the name and style of the Board of Commissioners of the county of ———, and as such, and in such name may prosecute and defend suits, and have all other duties, rights and powers incident to a corporation. The majority of the members of the board constitute a quorum to do business.(135) As the law makes the board a corporation, we shall inquire into the nature, character and power of a corporation.

A corporation is an artificial being, invisible, intangible and existing only in contemplation of law; or it may be defined "a franchise possessed by one or more individuals who subsist as a body politic under a special denomination, and vested by the policy of the law with the capacity of perpetual succession, and acting in several respects, however numerous the association may be, as a single individual. (134)

The Board of Commissioners is what is called a public corporation, and was created by the act of our State legislature for political purposes, and they possess subordinate legislative powers to be exercised for local purposes connected with the public good, and their power is subject to the control of the legislature of the State. In legal contemplation the Board of Commissioners is the county; they are sued for the county debts and have full control of the finances of the county.(135) They possess no power or authority except what is given them by law. The acts of the legislature are to the Board of Commissioners what the constitution of the State is to our legislatures; and all acts of the board not authorized by law is absolutely void.(136) They have the authority to make such rules for the transaction of business as they may deem

(134) 2 Kent, 267; 4 Wheaton's U. S. R. 636. (135) 1 G. & H., p. 247. (135) 4 Ind. 315; 16 Ind. 29. (136) 4 Blackf. 241.

proper and right; and in the trial of causes that may come before them, they shall be governed as far as practicable by the rules of conducting business in the circuit court.(136) They have the power to preserve order and to punish contempt by fine not exceeding three dollars, or imprisonment not exceeding twenty-four hours. Each member composing the board is authorized by law to administer all oaths that may be necessary to enable them to perform all business required of them under the law. They may enforce obedience to all orders made by them by attachment or other compulsory process; and where fines are assessed by them execution shall be issued thereon, and the same is collected by the sheriff and paid over as other fines are collected and paid.(137) Under this statute they have the right to impose a fine on the county auditor, or sheriff, or any subordinate officer or their deputies, for neglect or refusal to obey their orders. They can fine witnesses who have been subpœnaed and refuse to attend, or who are present in court, and refuse to be sworn, or for any other misconduct amounting to contempt. When a fine is assessed by the board against any one for contempt, they must cause the same to be entered up in the form of a judgment, and sign up the same as a part of their record; when this is done the law makes it the duty of the county auditor to issue an execution on the same to the sheriff of the county, commanding him to make the fine and costs out of the property of the defendant. The record may be in the following form:

STATE OF INDIANA
vs.
JAMES RAY. } *Attachment for Contempt.*

A subpœna having been issued by the auditor of this county for the said James Ray, as a witness to give testimony in the case of John Smith vs. Richard Roe, now pending before this board, and it appearing to the satisfaction of the board that said subpœna was duly served on the said James Ray, on the 1st day of January, 1871, and that

(136) 1 G. & H., p. 249. (137) 1 G. & H., p. 249.

he has neglected to attend as such witness, an attachment is therefore this day issued against him, returnable forthwith. And afterwards, to-wit, in the afternoon of this day the sheriff having returned said writ of attachment with the body of the said James Ray; and the said James now failing to purge himself of said contempt, the board, after hearing the evidence, finds the premises to be true as above set forth. It is therefore considered and adjudged that for said contempt, in disobeying said subpœna, the said James Ray make his fine to the State of Indiana in the sum of three dollars, and that he pay the cost of this prosecution, and that he stand committed until the fine and costs are paid or replevied.

S.
R.
B. } Commissioners.

The board of county commissioners is an inferior court, of special and limited statutory jurisdiction. It must appear therefore upon the face of its proceedings that its action was conformable to the requisitions of the statute governing it. When a court of limited jurisdiction exceeds its rightful powers, the whole proceeding is *coram non judice* and void; and its judgments and orders made under such circumstances are regarded as nullities. They are not only voidable, but void.(137)

The law is well settled that where a statutory power is conferred upon a court of inferior jurisdiction, and a mode of executing those powers is prescribed, the course pointed out must be strictly pursued, or the acts of such court will be *coram non judice* and void.(138) But when such court has been intrusted with the exercise of discretionary power, and the acts done are within the power conferred, and have been performed in good faith, no court possesses the power to interfere with or control such discretion.(139) And in the case of Cable vs. The State, our supreme court held that the record of a court of limited jurisdiction must

(137) 4 Black. 476; 10 Ind. 358. (138) 34 Ind. 115; 5 Black. 462; 27 Ind. 233; *id.* 133 (139) 34 Ind. 115.

affirmatively show such a state of case as warrants the exercise of jurisdiction.(140) But in the case of the board of commissioners of Madison county vs. Brown, they held that the record need not disclose the fact that the board of commissioners of that county had been called together in special session, but that the fact might be shown *aliunde*, or by other evidence.(141) The boards of county commissioners of this State are for certain purposes judicial tribunals.(142) But they are something more than a court; they possess legislative powers, or a power to enact laws in certain cases for the county in which they preside.(143) But this legislative power should only be exercised when clearly authorized by the statute.

The statute confers upon them jurisdiction of the following cases:

1. To make orders respecting the property of the county in conformity to law. Under this section they can control and direct how the property of the county shall be used, and how cared for.(144)

2. To sell the public grounds of the county upon which the public buildings are situated, and to purchase in lieu thereof, in the name of the county, other grounds in the county seat, on which such buildings shall be erected; to purchase other lands for the enlargement of the public square, and to take care of and preserve such property. (145) But to do this they must give six days' notice of the time, terms and place of sale, and a description of the property to be sold.(146)

3. To allow all accounts chargeable against the county, not otherwise provided for, and to direct the raising of such sums as may be necessary to defray all county expenses. But no allowance shall be made by such county commissioners, unless the claimant shall file with such commissioners a detailed statement of the items and date of charges, nor until such competent proof is furnished in

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(140) 27 Ind. 133. (141) 28 Ind. 161. (142) 29 Ind. 170; 5 Black. 325; *id.* 462; 22 Ind. 187. (143) 29 Ind. 170. (144) 1 G. & H. p. 250. (146) Act approved December 23, 1872.

favor of such claim, unless the board knows that the account is just.(145)

4. They shall cause a court-house, jail, public offices for the clerk, the circuit court, the county recorder, the county treasurer and county sheriff to be erected and furnished, where the same has not been done; and must keep all public buildings of the county in repair; and such offices erected for county purposes must be made fire-proof if practicable. And to enable them to erect, complete or repair the court-house, jail, or other county building, or whenever they wish to fund any debt incurred for county purposes, and the revenue afforded by reasonable taxation is insufficient to do the same, the county commissioners may borrow for that purpose any sum of money not exceeding one per centum of the assessed valuation of the real and personal property of the county, and issue bonds therefor in amounts of not less than twenty-five dollars each, and bearing a rate of interest not exceeding the legal rate in the State or territory where the same are negotiated, not exceeding the rate of ten per cent. per annum. But no second or subsequent loan shall be made or authorized by said commissioners so long as any former loan made after May 4, 1869, shall remain outstanding and unpaid. (146) Such bonds may be sold at any place within the United States, but at no greater discount than 8 per cent., and must be in form substantially as follows:

State of Indiana, County of ————, will pay to the bearer —— years from the date hereof, the sum of ——— dollars and —— cents, with interest thereon at the rate of —— per cent., payable annually at ————, in the State of ———, on —— day of ——, in each year. This —— day of ——, A. D. 18—.

S.
B. } *Commissioners —— County.*
R.

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(145) 1 G. & H. p. 250, sec. 2; *id.* p. 252 sec. 24; 35 Ind. 70. Under these sections a statement of the claim, though informal, will be sufficient if it advise the board of the nature of the claim with certainty, so as to prevent another application on the same claim. 8 Ind. 504. (146) 1 G. & H. p. 251; Act of 1869, p. 7. See also act of 1871, p. 42, sec. 44.

To each of these the auditor of the proper county shall attach his certificate in the following form:

I, ————, County Auditor, do hereby certify that the annexed bond was issued to the County Treasurer this —— day of ————, A. D. 18—. In testimony whereof I have hereunto set my hand and affixed the seal of said Board of County Commissioners, this —— day of ————, 18—.

[SEAL.] J. T., County Auditor.

The county auditor must deliver these bonds to the county treasurer, and charge him therewith upon the proper books in his office, and said bonds are deemed as a part of the funds of the county in the hands of the treasurer thereof, and the treasurer will be held liable for the same upon his official bond, the same as he is held for other funds or securities belonging to the county. These bonds are negotiable by endorsement, so as to vest the property absolutely in each and every endorsee successively. After these bonds have been sold by the treasurer, the commissioners must make a levy of not less than one-tenth of one per cent. on the taxable property of such county, and cause the same to be placed upon the tax duplicate, to be properly designated by the auditor in a separate column for the current and succeeding year. And when such tax is collected by the treasurer, the money shall be invested in the bonds aforesaid, or other State and county securities, which shall constitute a sinking fund for the liquidation of debts created by the issuing of such bonds. They must also provide for the payment of the annual interest that will accrue on these bonds, and all other indebtedness of the county. For this purpose they must make a distinct, and special levy, and cause the same to be placed in a separate column on the tax duplicate of the county, and when the same is collected it must be applied to the payment of the interest on the bonds and other indebtedness of the county, and if there is a balance remaining after discharging the interest on the entire indebtedness of the county, it must be applied on the principal of such indebtedness. If the county treasurer shall fail to sell the bonds delivered to

him, from any reason, he must, in a reasonable time, or within the time fixed by the board of commissioners, return the same to the county auditor, who must give him credit for the same upon his books; and at the next session following, the board must cancel or otherwise destroy the bonds so returned, in the presence of the auditor and treasurer of the county, and cause an entry of the fact to be entered in the order book.(147)

In proceeding under this statute the board must follow its directions, and if they make a material deviation from the course marked out by the law, their acts will be null and void, and the collection of the tax enjoined by the superior courts.

In the case of English and others vs. Smock and others, our supreme court held that when the board made the interest on the bonds payable semi-annually, when the law made it payable annually, that their acts were *coran non judice* and void.(146)

But they cannot make any contract for the construction of any court-house, jail or other county or township building, or bridge, fence or monument, until a plan and specifications have been adopted by such board, and such plan and specifications have been deposited in the office of the auditor, and open to the inspection of the people of such county; and all contracts attempted to be made in violation of the above requirements, will be null and void. After this is done they must advertise the letting of the contract (and request bids) in at least one newspaper of general circulation in said county, and by posting up notices of such building, with the time, place and terms of the same with reference to plan and specifications. But if the cost of the fence or bridge to be built does not exceed in cost five hundred dollars, the contract can be let without advertisement.

After they have advertised the letting of any court-house, jail or other county or township building, or bridge, fence or monument, on the day fixed for such letting they

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(146) 34 Ind. 115. (147) 1 G. & H. secs. 16, 17, 18, 19, 20, 21, 22, 23, pp. 252, 253.

must let the same to the lowest responsible bidder, on the terms in notice mentioned; and they must require the contractor to give bond in a penalty of at least one-fourth the value of such work, to perform the labor according to the specifications. If the contractor can give bond he must be considered responsible.(147)

5. They must, at their June session in each year, assess the necessary amount of taxes on each one hundred dollars' worth of property, in their county to defray county expenses.(147)

6. They must approve the bond of the county auditor of their county, which must be in the sum of two thousand dollars. But before they can do this the bond must have been executed by the principal and sureties, and the execution of the same duly acknowledged before some officer authorized to take acknowledgment of deeds by the principal and sureties executing the same. Said acknowledgment must be duly certified on the bond by the officer taking the same, as in other causes.(148)

7. They must, after the same has been executed by the principal and not less than four sureties, in a penalty not less than double the amount of money that may come into his hands at any time during his term of office; and after the execution of the same has been acknowledged by all the parties thereto before some officer authorized to take acknowledgment of deeds and the acknowledgment duly certified on the back of the bond, approve the bond of the county treasurer.(149)

8. They may remove any delinquent county treasurer of their county from office after suit has been commenced on his official bond.(150)

9. They must make a complete settlement with the county treasurer of their county at their June session in each year; in which settlement the treasurer of the county must make a full statement of all monies that has come into his

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(147) 1 G. & H., p. 68, sec. 1. (148) 1 G. & H., 122; Act Special Session 1865, 178. (149) Act of 1865, Reg. Session, p. 62; Act of Special Session of 1865, p. 178. (150) 1 G. & H., p. 642, sec. 12. (147) Act approved Dec. 23, 1872.

hands during the year, the amount on hand, the amount paid out by him, and in fact a full history of his official business during the fiscal year ending on the first Monday of June.(151)

10. They may take possession of and control all plank, gravel or Macadamized roads in their county, whenever the same shall have been abandoned and suffered to go out of repair by the corporation which constructed them. And when this is done they must annex said road for repairs to contiguous appropriated road districts of their county.(152)

11. They must, at their June session in each year, make a fair and accurate statement of the receipts and expenditures of the preceding year, and must have the same posted at the door of the court-house and in two other public places in the county, and publish said notice in some newspaper in their county, if any is published therein.(153)

12. On application made to them by any one, they may exempt any person from paying poll tax in their county on sufficient cause shown of inability to pay the same.(154)

13. Whenever public convenience requires the erection or repair of any bridge across any stream forming the boundary line between two counties, upon application to the Board of County Commissioners of either county, such Board of County Commissioners may, if they think it expedient, declare their willingness to aid in the erection or repair of such bridge by resolution or order, and shall cause notice thereof to be given to the Board of County Commissioners of the other county interested therein, and whenever it may be ascertained that the Board of County Commissioners of both counties have made such order or resolution, such Board of County Commissioners shall, by concurrent resolution, cause a survey and estimates to be made, submitting plans and specifications therewith by some competent person, to be presented to their respective Boards of Commissioners at some specified time and place at or near the site of such contemplated bridge, when such Boards of County Commissioners shall meet in joint session to esti-

(151) 1 G. & H., p. 642, sec. 13. (152) 1 G. & H., p. 250, bottom. (153) 1 G. & H., p. 253, sec. 29. (154) 1 G. & H., p. 253, sec. 30.

mate and determine the kind of bridge which shall be erected, and the manner and time when payments shall be made for the repair or erection of such bridge.

It shall be the duty of said Boards of County Commissioners, while in joint session, to appoint one or more persons as superintendents, who shall have full control and supervision of the erection and repair of said bridge, subject, however, to such regulations as such Boards of County Commissioners may determine upon.

It shall be the duty of such Boards of County Commissioners, in joint session, to make such appropriation for their respective counties as will make an equitable proportion to each county of the whole cost of construction or repair of such bridge, and such appropriations shall be in proportion to the taxable property of the two counties; and all taxes hereafter levied for the erection, repair or purchase of any such bridge, so situated, shall be levied in accordance with this act.

The said boards may require bond and security from such agent or superintendent, or from any contractor or contractors, which may be made payable to both or either of such boards.

Each county shall be regarded as the owner of an interest in any bridge erected in pursuance of this act, and each shall have a voice in regulating the use thereof.(153)

All their joint proceedings under this act should be recorded in a book to be kept by the commissioners of one of the counties, or perhaps the better way would be to make a duplicate record, so that each board would at all times be in possession of a copy. The record should be signed by all the commissioners who composed the joint session.

14. The Trustees of the different townships of the county must at their March sessions of each year, and as much oftener as the board may require, make a report in writing for the fiscal year then ending, and their reports must show clearly and separately the following facts:

1st. The amount of special school revenue, and of school

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(153) Acts of Special Session of 1869, p. 27, sec. 28.

revenue for tuition, on hand at the commencement of the year then ending.

2d. The amount of each kind of revenue received within the year, giving the amount of tuition revenue received at each semi-annual appointment thereof.

3d. The amount of each kind of revenue paid out and expended within the year.

4th. The amount of each kind of revenue on hand at the date of said report, to be carried to the new account, and shall, with said report, present and file a detailed account current of the receipts and payments for the year, and support the same by proper vouchers, which report and account current shall each be duly verified by affidavit; and when the said County Commissioners are satisfied that said report is full, accurate and right, in all respects, and that said account is just and true, they shall allow and pass the same, which shall have the effect to credit the trustees for the expenditures. And, upon failure of the trustee to discharge any of the duties required by him, relative to schools and school revenues, the Board of County Commissioners shall cause suit to be instituted against him, on his official bond, and, in case of recovery against him, the court rendering the judgment shall assess upon the amount thereof ten per cent. damages, to be included in said judgment.(154)

They must, also, at the same time, make a complete report of the receipts and expenditures of his township during the preceding year, which report must clearly exhibit the amount received and expended on account of township, road, school and other expenses, as well as the proper balance remaining on hands.(155)

15. The County Auditors and County Treasurers shall annually report in writing to the Board of County Commissioners of the respective counties, at the June session of said board, relative to the school fund held in trust by said counties, distinguishing in said reports between the Congressional Township and Common School funds, indicating the amount thereof, the additions to them within the cur-

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(154) Act of Regular Session of 1865, p. 5. (155) 1 G. & H., p. 638, s. 11.

rent year then ending, the sources from whence such additions are derived, the condition of them as to their safety, giving the amount thereof safely invested, unsafely invested, and uninvested, and lost, at the date of said report, giving also the amount of interest collected upon said funds within the year then ending, and the amount then due and unpaid.

SEC. 104. The Board of County Commissioners shall annually, at their June session, in [the] presence of the Auditor and Treasurer, examine said reports, the accounts, and proceedings of said officers, in relation to said funds, and the revenue derived from them. They shall compare with said reports, the cash, the notes, mortgages, records and books of said offices, with a view to ascertain the amount of said funds and their safety, and do whatever may be necessary to secure their preservation and the prompt payment of the annual interest thereon as the same becomes due, and make up to said funds losses which have accrued or may accrue.

SEC. 105. The County Commissioners at said session shall make out for their respective counties, a report in writing of the result of such examination, showing:

1st. The amounts of said funds at the close of the last year.

2d. Amount added from sale of land within the year.

3d. The number of acres of unsold Congressional Township School lands, and the approximate value thereof.

4th. The amount added from fines and forfeitures.

5th. The amount added by the Commissioners of the Sinking Fund.

6th. The amount added from all other sources.

7th. The total amount of the funds.

8th. The amount refunded within the year.

9th. The amount re-loaned within the year.

10th. The amount safely invested.

11th. The amount unsafely invested.

12th. The amount uninvested at date of report.

13th. Amount of fund lost since 1842.

14th. Amount of interest collected within the year.

15th. Amount of interest delinquent.

And in said report the Commissioners shall distinguish between the Congressional Township Fund and the Common School Fund, and in their account of the interest or revenues derived from said fund they shall observe the same distinction.

Such report shall be entered on the records of said board, and copies thereof, signed by the members of the board, the auditor and treasurer, shall be transmitted to the Auditor of State and the Superintendent of Public Instruction.(156)

16. They may at any session examine the books, papers and accounts of any trustee relative to school; and for this purpose they may by subpœna summon any trustee before them, and require the production of such books, papers and accounts, three days' notice of the time and place to produce them being given. And on inspection, if they find that such books have been imperfectly kept, the board may correct them, and if fraud appears, they must remove the person guilty thereof.(157)

17. They must conform the boundaries of their civil township to those of Congressional so far as practicable to do so.(157)

18. On the presentation of the certificate and return of any township trustee of their county, or a petition signed by a majority of the voters of any congressional township by the auditor of their county, they must, after satisfying themselves that the requirements of the law had been substantially complied with, direct the sale of any land belonging to the Congressional township fund in their county, the sale to be conducted according to law.(158)

19. That whenever there has been, or shall be destroyed, all or any of the books, pamphlets, papers, records or other writings, belonging to any county in this State, or of any court of record held therein, it shall be the duty of the auditor of such county forthwith thereafter to notify the members of the board of commissioners of such

(156) Act of Regular Session of 1865, pp. 24 and 25. (157) Act Reg. Ses. 1865, 32, secs. 141, 142, 143 and also 148. (158) Act. Ses. of 1865, pp. 16, 17, 18.

county to meet at such time and place as he shall designate, and they shall so meet accordingly; and may, during the twelve months from thence next ensuing, meet from time to time on their own adjournments, if such meetings shall in their opinion be rendered necessary by the destruction of the records aforesaid.

Such board, when so met, shall, on proof made before them, cause to be made out and certified by the auditor of such county, a list of all books, pamphlets documents, records, maps and other papers, whether written or printed, which have been so destroyed, which had before such time been furnished such county by the State government by virtue of any law or joint resolution of this State, which certified list such auditor shall forthwith forward to the Governor of the State.

It shall be the duty of the Governor, immediately on the receipt of said certified list, to notify the officer or officers of State, whose duty it may be to furnish to the counties pamphlets, books, documents, maps, records and other papers, whether written or printed, of the fact of such destruction; and it shall be the duty of such officer or officers immediately thereafter to furnish to such county all such pamphlets, books, documents, maps, records and other papers, whether written or printed, as may be so certified to have been destroyed, in the same manner as if such county had never received the same.

If the records required to be kept in the recorder's office of any county in this State have been or shall be destroyed in whole or in part, it shall be the duty of such recorder forthwith thereafter to procure a book or books, in which he shall from time to time, and in the order in which they may be presented, record such deeds and other instruments of writing as had been previously recorded in such office, and the record whereof has been destroyed; and he shall also immediately after the record of such deed or other instrument, record the endorsement thereon made by the recorder, of the time when said deed was originally filed in such office for record: and such record shall have

the same force and effect as the original record would have had if the same had not been destroyed.

Such recorder shall also procure another book or books in which he shall record, in the order in which the same may be presented to him, all such proof of the execution, acknowledgment, contents, destruction and recording of any deed or other instrument before that time recorded in such office, the record whereof has been destroyed, as may be made before him in the manner hereinafter prescribed; which said book or books, together with the book or books required in the last preceding section, shall be by such recorder indexed in the same manner as records of deeds may at such time be required to be indexed by existing laws.

Whenever any person having an interest in perpetuating the evidence of any deed or other instrument in writing, proper to be recorded, the record whereof in such office has been destroyed, will make oath before such recorder that he has such interest,—that such deed or other instrument has been previously recorded in such office, and that though he has made diligent search for the original of such deed or other instrument, he has been unable to find the same, such recorder shall at the instance of such person, after first recording such oath, and causing such affiant to sign such record, proceed to take such proof under oath as may be produced before him, recording the same in such book, and causing the witness to sign such record, to which he shall also add his certificate of their having been duly sworn in the premises.

Such proof shall consist of evidence of the deed and execution and acknowledgement of such deed or other instrument—of the date and contents of the same,—of the fact that the same had been previously recorded in such office, and the time when it was so recorded, or deposited for record, as nearly as the witness or witnesses may be able to state. But such recorder, before examining any witness, shall require him to state on oath, that he has no interest direct or indirect in perpetuating such testimony, which statement shall be incorporated in such record.

Such recorder shall be authorized to administer all oaths required by this and the last preceding section of this act, and may himself be sworn as a witness by any person authorized to administer oaths.

In all suits in any court in this State, it shall be competent for either party to read in evidence such record of testimony, or a copy thereof, certified by the recorder of such county, to be a full copy of all the testimony relative to such deed as it may have relation to, as may be contained in such record; and such record, or such copy thereof, when so read in evidence, shall have the same force and effect as if the witness or witnesses had been sworn to the same facts on the trial of such cause,—and may be excluded, rebutted or impeached, in the same manner that such testimony might have been excluded, rebutted or impeached, if sworn to by such witness or witnesses on such trial.

If the records or files of the circuit, probate, common pleas, commissioners or other inferior court of record in any county in this State, or the papers on file in the office of the clerks of either of such courts, or the bonds, notes, or other papers belonging or properly filed in the office of the treasurer, auditor, assessor, or other officer of any county in this State or any, or either of them, have been, or shall be in whole or in part destroyed, the board of commissioners when they shall have met as in the first section of this act required, shall appoint a commissioner, who after having taken an oath of office as such commissioner, shall forthwith proceed to discharge the duties hereinafter required of him

The said commissioner may, if he deems the same necessary, employ a clerk; and such clerk, before entering upon the discharge of his duties, shall take an oath of office. Such commissioner shall also procure a sufficient number of substantial record books, in which shall be recorded at length the proceedings had before such commissioner hereinafter authorized, keeping in separate books the record of business appertaining to the different courts, and the offices

of the different officers of such county. Such commissioner shall have power to administer oaths in all cases where testimony is required to be taken before him.

If the Board of Commissioners of such county shall at any time become satisfied that such commissioner is incompetent, or unreasonably delays or neglects the duties devolved upon him by this act, they may, by order of record, remove him from such office and appoint a successor, and from such order of removal there shall be allowed no appeal. And such Board of Commissioners may, at any time after twelve months from the time when such commissioner enters upon the duties of his office, require him, within twenty days thereafter, to close up the business of his commission; after the expiration of which twenty days the duties of his office shall cease. But such Board of Commissioners may at any time thereafter authorize a resumption of said duties for a limited period.

Such commissioner, before entering upon the duties of his office, shall give twenty days' notice of his appointment, and of the time and place when and where he will commence discharging such duties, by publication in some newspaper of general circulation, printed and published in such county, if there be one, and by posting up written notices in each of the townships of such county. Such commissioner may adjourn from time to time, as the business before him may require; but after an adjournment without day, he shall not again resume the duties of such office without an order of the Board of Commissioners of such county shall authorize him so to do.

Such commissioner shall have power to administer all oaths necessary and proper to be taken before him—to issue subpœnas for witnesses, and compel their attendance by attachment—punish contempts by fine, and issue execution therefor—tax costs, and issue fee bills therefor; and such writs and subpœnas shall be served by the sheriffs of the several counties in this State, who, together with witnesses, shall receive therefor the same compensation which may be allowed by law for the same service or attendance in the

circuit court, to be taxed against the party making such cost."

Such commissioner shall, if he employ a clerk, be entitled to receive, as compensation, a sum to be allowed by the Board of Commissioners, not exceeding three dollars per day for the time actually employed; and if he acts as his own clerk, a like compensation of not exceeding four dollars per day. Such clerk, if one be employed, shall be paid not exceeding two dollars per day. The recorder of any such county shall be entitled to charge half the usual fees for recording, to be paid by the person for whom the same is done. All expenses of books, stationery and per diem, shall be paid by such county.

Whenever in any county both the assessment rolls and duplicates shall be destroyed, the Board of Commissioners of such county shall cause new assessments and appraisements to be made out, in the same manner and under the same regulations that the original assessments and appraisements were made—and all such proceedings shall be thereafter had as may be necessary and proper under existing laws, to enable the treasurer to collect all taxes due in such county.

All persons charged with taxes on such duplicate made out as in the last preceding section is required, shall be liable to pay the same, unless such person shall produce a proper receipt for the same, or shall satisfy, by competent proof, such Treasurer, or the Board of Commissioners of such county, that he has paid the same.

20. That whenever twelve freeholders of any county shall sign and present to the Board of County Commissioners in session, a petition setting forth that a public highway (describing it) in their road district, or districts, township or townships, is situated upon, contiguous to, or near by a county line, and has not been worked for some length of time in consequence of a difference of opinion as to whose duty it was to work such road.

When such petition shall be presented to the Board of County Commissioners, such board shall appoint two freeholders of the county, not belonging to the road district where such road is required to be worked, who shall em-

ploy the county surveyor to perform the duties required by this act.

It shall be the duty of the county auditor of said county to immediately, by letter, give notice through the auditor, to the other county board upon whose border said road is situated, of the filing of such petition, sending a copy of the same, and also of the appointment of such commissioners, referring to this act for authority for so doing; whereupon it shall be the duty of the county board thus notified, at their first session after, to appoint a like two commissioners, and the four persons so appointed and the county surveyor shall meet at the time and place designated by such Board of County Commissioners at some convenient point along the line of said road as described in such petition, who having been first sworn according to law, shall proceed to carefully examine the condition and location of said road, and if practicable shall locate such road upon the county line, fixing the center of such road upon the county line having first surveyed the whole line of road.

Such commissioners shall, as nearly as possible, make an equal division of such road, taking into consideration the amount of labor presumed to be necessary to keep such road in repair, as well as the length thereof, and mark the spot by fixing a stone firmly in the ground, and shall determine which of the respective counties shall each work the respective divisions thus designated.

Such commissioners shall make out a report of the proceedings, describing by metes and bounds the portion of the road to be worked by each county, a copy of which shall be duly transmitted to the Board of County Commissioners of each of the two counties, and shall be by them entered upon record, and they shall notify the trustees of the township or townships in interest, and furnish them with a copy of the report of said commissioners, that it is hereby made their duty to open and work such road as other county roads are worked, as the law requires.

The county surveyor, when met with such commissioners, is hereby authorized to act with said four commissioners in locating and marking the place that each respective

county shall work: *Provided*, That whenever the Board of County Commissioners of either county shall refuse or neglect to appoint commissioners to act upon the petition filed according to the provisions of this act, the two commissioners appointed by the other county, in connection with the county surveyor, shall proceed to discharge the duties required of the four commissioners, and their action in the premises shall have the same force and effect and be equally binding as the action of the four commissioners.

Such commissioners and surveyor shall each receive for his services one dollar and fifty cents per day for every day they are necessarily employed in performing the duties herein required, and the surveyor his lawful fees, to be paid out of the county treasury of the respective counties.

PETITION.

To the Honorable Board of Commissioners of Vermillion county:

We, the undersigned, freeholders of Vermillion county, Indiana, would represent to your honorable board that a certain highway situated on the boundary line between the counties of Vigo and Vermillion, in Road District No. —, of which we are residents, in Clinton township, in said county, which is known as the Shue road, which commences at the south-west corner of section 33, township 14, range 10 west, running thence east two miles, has not been worked for two years in consequence of a difference of opinion as to whose duty it was to work said road, whether the citizens of the county of Vigo or of the county of Vermillion. We therefore ask your honors to appoint two commissioners to make an equal division of said road, setting off to each county their respective shares for work. And we will ever pray.

A,
B, H,
C, I,
D, J,
E, K,
F, L,
G, M.

On presentation of this petition introduce a witness, or an affidavit of one, that the petitioners are freeholders, and that they reside in the road district mentioned in the petition, thereupon the board will make the appointment.

21. That the auditors of the several counties of this State be, and they are hereby, required to examine all, or so many of the books, papers and records on file in their offices, relating to the school funds, Common and Congressional, as shall enable them to ascertain the amount of said funds held in trust by their several counties.

The amounts thus ascertained shall be, by said auditors, submitted to the Board of County Commissioners for approval, and when so approved by the board shall be spread on the records of said Commissioners' Court, and the auditor shall forward a duly certified copy thereof to the Superintendent of Public Instruction on or before the third Monday in June, 1866, for his approval, and when approved by the Superintendent of Public Instruction, he shall cause the same to be recorded in a book kept for that purpose in his office, and when so recorded, he shall notify the county auditors making such reports of his approval; and said statements, when so approved, shall be taken as conclusive evidence of the facts therein contained.

The auditors of the several counties, for their services in making said investigation and reports, shall receive such compensation for their services as they are allowed for similar services, to be allowed by the Board of County Commissioners and paid out of the county treasury.(159)

The assessors provided for in section 2 of the gravel road law, shall receive, as a compensation for their services, two dollars and fifty cents a day for the time actually employed, to be paid out of the county treasury, on the order of the board of county commissioners.

No road made under said act shall be less than five miles in length, and shall be commenced within two years from the day of permission to organize, and shall be completed within six years, and said companies shall have power to

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(159) Act of Special Session of 1865, p. 144.

construct branch roads of not less than two miles in length, by petition, as provided in the first section of the above recited act, and where companies have in their organizations contemplated branch roads, and complied with all the requirements of the first section of the above recited act, they shall be enabled to complete the same under the provisions of the above recited act: *Provided, however,* That all acts of companies heretofore organized under said law made and done, and orders entered upon their books for the purpose of establishing and constructing branch roads, be and the same are hereby legalized.(158)

The act approved December 2, 1865, provides that in all cases in which any gravel road company, organized under existing laws of the State, may have completed three-fourths of the entire line of road at the expiration of the time allowed them by law for completing the same, such company shall be entitled one year in addition to the time now allowed to complete their said roads.(159)

82. That a grand jury shall consist of twelve members, all of whom shall be reputable freeholders or householders of the proper county, and taxable therein.

The board of commissioners of each county at their first regular session in each year, shall select from the tax duplicate of the preceding year, the names of sixty persons having the requisite qualifications, which shall be written on separate ballots, and placed in a box prepared for that purpose.

The names so selected shall be divided equally as nearly as possible among the civil townships of the county.

The clerk of the circuit court, in the presence of said board, shall draw by lot from said box the names of twelve persons, to serve as grand jurors.

In drawing said jurors, not more than one shall be drawn for the same township, if there be so many in the county; and if not, at least one shall be drawn from each township, after which the clerk shall continue to draw, observing the same rule, until the panel is filled.

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(158) Act of 1869, p. 73; Act of 1865, p. 99. (159) Special act 1865, p. 132.

The auditor shall record among the records of the board of commissioners, the names of the persons so drawn, and shall deliver a certificate thereof to the clerk of the circuit court, who shall record the same on the order book of said court, and the persons so drawn shall compose the panel of grand jurors for the first term of the circuit court; and said clerk shall issue a venire to the sheriff accordingly.

A panel of grand jurors shall be separately selected, at the same time and in the same manner, for each term of the circuit court to be filled in one year, but the same person shall not be selected for any two terms in the same year.

If the board of commissioners shall fail to select the grand jurors at their first annual session, they shall select at the next or any other session.(215)

24. The township trustee, with the concurrence of the board of county commissioners, shall assess annually a road tax of not less than one nor more than twenty-five cents on the one hundred dollars, to be levied according to the amount of real and personal property owned in said township subject to taxation, to be collected, &c.(160)

25. That the number of justices of the peace in each township shall be regulated by the board of county commissioners of the county, by proper orders of record; but the number shall not exceed three for each township, and one in addition thereto for each incorporated town therein, and two in addition thereto for each incorporated city therein; and authenticated copies of such orders shall be furnished by the auditor to the clerk of the circuit court.(161)

26. That it shall be lawful for the board of county commissioners of any county in this State to convey to the board of trustees of any incorporated town, or to the common council of any city, and the successors in office of such trustees or councilmen in office, any cemetery adjoining to, or within the corporate limits of such town or city,

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(215) 2 G. & H. (160) Act 1867, pp. 134, 135. (161) Act 1867, p. 152; 28 Ind. 51.

upon the application of a majority of the citizens of such incorporated town or city, or on petition of the president and trustees of such incorporated town, or the mayor and common council of such city to such county board, notice of which application shall have been given by publication in a newspaper of general circulation, printed and published in such city or incorporated town, or by posting up not less than three written advertisements of such intended application, in public places therein, for not less than twenty days before any regular session of such board of county commissioners.(163)

23. The board of commissioners of each county shall furnish the necessary record books, fuel and stationery for the offices of auditor, treasurer, recorder and clerk, and may, in their discretion, furnish the same to the sheriff of the circuit and common pleas court of their respective counties, at the expense of such county, and shall also provide safe and suitable offices for such officers.

22. That the several boards of county commissioners of this State be, and they are hereby authorized to procure a proper book for the purpose of receiving subscriptions and donations from any person or persons who may desire to contribute for the erection of a monument to those who have or may lose their lives in the present war, from their own counties; said subscription book shall be properly preserved by the several county auditors, and shall be free to the inspection of any one who has lost friends or relations in the present war for the suppression of the rebellion.

The said several boards of county commissioners may make such allowances or appropriations out of their several county treasuries as they may think proper for the purposes named in the first section of this act.

Whenever the funds shall be deemed sufficient as specified in the first and second sections of this act, the said boards of commissioners shall proceed to select and purchase, if not donated, a suitable spot of ground at or near

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(163) Act 1867, p. 31.

the county seat of each county, whereon shall be erected a monument to the memory of the soldiers who have lost their lives in putting down the rebellion, whereon their names shall be inscribed, with the name of the battle or place where they fell.

The grounds or monuments shall be under the care and control of the said several boards of county commissioners, who shall see to the proper preservation of the same.

The funds so paid or donated for the purposes aforesaid, shall be paid to the proper county treasurers, for which they shall be charged by the county auditors, and the same shall be styled "the soldier's monument fund."

27. That in all cases where there has heretofore been, or may hereafter be, a change of county boundary, by which territory lying in one county is attached to another, it shall be the duty of the board of county commissioners of the county to which said territory has been or may be attached, to procure a suitable book or books, and to cause to be copied therein from the records of the recorder's office of said other county, all deeds and mortgages of real estate within said territory that shall have been recorded before the change of boundary aforesaid.(164)

28. That any person, not a body corporate, who may be interested in constructing any levee, drain, break-water, or who may be interested in opening or clearing out any drain or water course, or doing any other work necessary to protect or reclaim wet lands, which cannot be completed without affecting the lands of other persons, may make application in writing to the board of commissioners of the county in which the lands to be affected thereby, or some part thereof, are situated, specifying the character of the work contemplated, its general course, extent, hight, depth, width, the amount of fall per mile, the point of beginning and its terminus, with a description of the lands to be affected thereby, together with the names of the owners of such lands, if the same be known to such applicant, or the name of the occupant of such lands, if any there be,

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(164) Act 1867, p. 32.

and thereupon said board shall appoint three disinterested freeholders of the county in which the application is made, and not of kin to any of the parties, appraisers to assess the benefits and damages to any of such lands incident to said contemplated work.

The auditor of such county shall make out and deliver to such applicant a transcript of the application, and of the proceedings of the board of commissioners thereon. Such applicant shall deliver said transcript to the persons appointed appraisers by the board of commissioners.(165)

29. That whenever fifty-five per cent. of the legal voters of any county in this State shall, by written petition request the board of commissioners of their county to re-locate the county seat of such county, designating in such petition the site where such re-location is desired, and shall procure the conveyance to such board by deed conveying good title of two lots of ground, one containing not less than two acres as a site for the court house, and the other containing not less than one-fourth of an acre as a site for the county jail, to be held by such board for that purpose, and shall deposit with such board the sum of one hundred dollars to pay an architect, and one hundred and fifty dollars to pay commissioners to assess damages, then such board shall proceed to have new county buildings erected thereon, and the county seat removed thereto, in the manner and upon the conditions set forth in the following section: *Provided*, That no such re-location of a county seat shall be made unless it shall be removed at least three miles.

If such petitioners, or some of them, shall, within three months after such estimates and plans are presented, cause to be paid into the county treasury, or the payment thereof secured to such board to their satisfaction, a sum equal to the value of the real property belonging to the county at the then county seat, then such board shall at once cause the auditor to immediately advertise in the newspapers of such county, if any there be, or if none, then in the nearest newspaper of general circulation, and by posting in six

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(165) Act 1867, p. 186.

places in said county, for sealed proposals for the erection of such buildings according to said plans and specifications.(166)

30. The board of county commissioners of the proper county may designate one or more places of holding elections in any township, or form precincts of two or more townships, when public convenience require it. And in case such board of commissioners shall designate more places of voting in any township, or form a precinct of two or more townships, they shall at the June term of said board of county commissioners preceding any election, appoint some freeholder who shall be a qualified voter of such precinct, to act as inspector thereof, and may at any general or special session, fill any vacancy that may have occurred, and such inspector shall, previously to the time of opening the election at any precinct, appoint two freeholders, qualified voters of such precinct, judges of such election, such judges to be selected from the political parties, so that each party may have a representative on the board of election: *Provided*, There are different political parties in such precinct, and such appointment shall be made from the two political parties casting the highest number of votes in such township or precinct, and such judges, together with such inspector, shall constitute a board of elections.(167)

31. Whenever in the opinion of the County Commissioners of any county the public convenience requires that a bridge should be repaired or built over any water course, they shall cause a survey and estimate thereof to be made and the same to be erected. If the estimate thereof shall exceed the ability of the road district in which it is to be built, by application of its ordinary road work and tax to perform, the County Commissioners may make an appropriation from the county treasury to build or repair the same. They must receive and appropriate all donations for the repair and erection of bridges in their county. They may appoint to superintend the repairing and erection of any bridge one or more directors. They may authorize any

(166) Act 1869, reg. ses. p. 8. (167) Act 186–, special ses. p. 59; 1 G. & H. pp. 195, 196, 197.

person to build a bridge across any stream of water in their county and charge toll on the same in the payment of expenses of building the same. But they must reserve to themselves the right to levy and take possession of any such bridge by paying to the builder the sum expended in its erection with ten per cent. thereon. And they must, under such circumstances, regulate the toll to be charged by the builder. They may also charge toll on any bridge erected by them until they have received the entire amount expended in the building of the same, when the toll must cease. They may also, when they deem it for the public good, buy any toll bridge or purchase any private interest, and order the purchase money to be paid out of the county treasury. The law makes it their imperative duty to keep all bridges in repair in their county. And they must cause the supervisor of the proper road district to keep in a conspicuous place at each end of every bridge in his district, in some conspicuous place, the following: One dollar fine for riding or driving over this bridge faster than a walk.(168)

32. They have authority to establish ferries across creeks and rivers in their county, on application by any person who may own or hold by lease land on any creek or river, by petition. Before the board will be authorized to take jurisdiction of such cases, the applicant must show to the satisfaction of the board that he has given notice of the time and place that the applicant would apply for license by posting up written notices in three public places in the county before the meeting of the board.

When any river or creek shall be the boundary between two counties, any person, persons or corporation holding land on either side of said river or creek who shall desire a public ferry across the same, shall apply to the Board of County Commissioners for the county in which the land lies, who are authorized to establish such ferry from the land of such applicant to the opposite side, and in such case a certified copy of the order establishing shall be transmitted to the auditor of the county on such opposite side at

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(168) 1 G. & H., pp. 202, 203 and 204.

the expense of such applicant, and thereupon such county may assess a tax for license for such ferry, a sum not exceeding for both counties the amount charged for such ferry where one county alone is concerned, half of which tax shall be assessed by each county. But no ferry can be established by them either one mile below or above an established ferry, unless public convenience requires it.

If the owner of any land, lying on any creek or river where any road may cross, and public convenience requires a ferry, shall fail to have one established within a reasonable time after three months' notice in a public newspaper of the county, or by written notices set up in three of the most public places therein, the proper Board of County Commissioners may grant license to any person applying, to keep a ferry at that place, who may occupy as much ground, not exceeding one hundred rods on each side, as is necessary to discharge passengers.

But before such ferry shall be established, as provided for in the preceding section, such board shall appoint three disinterested persons to view the premises in question, and assess such damages as the owner of such land shall sustain by reason of the establishment of such ferry thereon, which assessment shall be returned and filed in the proper auditor's office, and upon the amount of such assessment being tendered the owner, or deposited in such auditor's office, such ferry may be established, and if the amount of such assessment be deposited in such office, the auditor shall give notice thereof to the owner.

The owner of the land where such ferry may have been established may take possession thereof on tendering the holder the full value of all the boats and other craft which may have been necessarily employed for the transportation of passengers and property, with all other expenses that may have accrued in improving the ferry, and ten per centum thereon, giving also the Board of County Commissioners a bond, with security, as hereinafter prescribed; which bond shall be a complete release of the obligations contained in the bond previously given by the holder of the ferry.

The Board of County Commissioners shall have authority

to order and direct, from time to time, the number and description of boats, and the number of hands which shall be kept at each ferry respectively.

Before the issuing of license to any person to keep a ferry, he shall execute to the State of Indiana a bond in the penal sum of five hundred dollars, with surety to the acceptance of the county auditor, conditioned for the keeping such ferry according to law, which bond shall be filed in the auditor's office.

Each licensed ferry keeper shall constantly keep a sufficient number of boats, if more than one be required by the Board of Commissioners, and give due attention to the transportation of all persons, with their property, who shall apply for the same, between daylight in the morning and dark in the evening, and at any hour of the night if required, except in cases of evident danger, to all other persons requiring the same, on their tendering double the rate of ferriage allowed to be taken in the day time, and such board may require such ferry keepers to keep such ferry open till midnight.

It shall be the duty of all ferry keepers within the State to cause the banks of the river or creek to be dug sufficiently low and kept in good passable order for the passage of man and horse, wagons and other vehicles; and such ferry keepers, and persons employed in attendance at such ferry, shall not be compelled to serve on juries or perform military duty.

The rates of ferriage shall be fixed by the Board of County Commissioners at the time of licensing the ferry, and from time to time thereafter, as they shall think proper.

If any ferry shall not be furnished with the necessary boats and ferrymen within six months after the establishment thereof, or if the proprietor shall wilfully neglect to attend to the same, or shall fail to comply with any of the requirements of the proper Board of Commissioners, such board on complaint to them, shall cause the proprietor of such ferry to be summoned, to show cause at the next meeting of the board, why such ferry shall not be discontinued, and such board shall vacate such ferry or dismiss such com-

plaint, according to the testimony adduced, and may award costs against the complainant if such complaint is dismissed, or against the proprietor if the ferry be vacated.

If any person is aggrieved by the establishment or vacation of a public ferry, he shall have the right to appeal to the circuit court of the proper county upon filing bond within thirty days thereafter, payable to the treasurer of the county, with security to be approved by the county auditor, and conditioned for the due prosecution of such appeal, the payment of all costs, if judgment be rendered against such appellant; and the county auditor shall cause such bond, with a certified copy of the proceedings of said board, and all the original papers of the cause, to be filed in the office of the clerk of the circuit court, within twenty days thereafter; and such cause shall be docketed for the ensuing term, and further proceedings had, and judgment rendered therein as in other cases of appeal.

When any person shall ferry across the Ohio or Wabash river on the Indiana shore, any where within one mile of any established ferry, any person or thing whatever, for which the owner of such ferry might have been entitled to ferriage had he ferried over the same, such person so ferrying the same over shall be liable to pay to the owner of such ferry the full amount of such ferriage, unless such established ferry was out of repair and not sufficiently attended; and in cases of sickness or distress, where delay would be dangerous.

It shall not be lawful to obstruct by steamboats, keelboats, flatboats, or otherwise, the landings of ferries established under this act; but such ferries shall be entitled to the exclusive use of the whole width of the routes leading thereto for all appropriate purposes.(170)

33. The board may establish and maintain a public library in each of the several counties, for the use of the inhabitants thereof, there shall be reserved ten per cent. of the net proceeds of all lots within the town where the county seat is situate, sold as the property of such county, and ten per cent.

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(170) 1 G. & H., pp. 344, 345 and 346.

upon all donations made to procure the location of such county seat; and the county commissioners shall make the necessary order for the collection and payment of the same.

The Board of Commissioners doing county business may at their June session in each year appropriate a sum not less than twenty, nor more than seventy-five dollars for the purchase of books, maps and charts for such library, and the same shall be paid to the treasurer of the library by the treasurer of the county, upon the certificate of the auditor thereof.

The clerk, auditor, and recorder shall have the charge of such library, and are hereby constituted trustees for that purpose. They shall elect one of their number treasurer, and a suitable person librarian, and shall prepare a proper room, with the necessary shelves and cases, within some county office, or building when practicable, to place and safely keep such library. They shall cause all moneys appropritated or belonging to the library, to be expended in the purchase of books, charts and maps, and report to the board of county commissioners in June, annually, the kind and number of books purchased, with the cost thereof. Each of said officers shall be liable on his official bond for the performance of duties herein required of him.

Every inhabitant of the county giving satisfactory evidence or security for the safe keeping and return of the books, shall be entitled to take and use the same upon the proper application to the librarian. But no one person shall at the same time have more than two volumes of books, nor for a longer period than forty days, without returning such books to the library.

The trustees shall establish by-laws, and rules for the regulation of such library, and the same shall be placed at a conspicuous point in the library room for the inspection of visitors. All fines or forfeitures accruing from the violation of such by-laws shall be recoverable in an action before any court of competent jurisdiction in the name of the State of Indiana, for the use of such library; and the librarian shall be a competent witness in such action, and the

entries made upon his books, in relation to such library, shall be *prima facie* evidence of the things therein charged.

The librarian shall make an entry in a proper book, of each book or map taken, the time thereof, by whom and when returned. He shall also keep a registry of the fines and penalties assessed, and collect the same by suit or otherwise. At the June session of the board of county commissioners in each year, he shall report the condition of such library, the books added or lost, within the preceding year, and the value of the same.(171)

34. That the boards doing county business in the several counties in this State be, and the same are hereby authorized to declare any water course in their respective counties navigable, on the petition of twenty-four freeholders of the county, residing in the vicinity, through which the same may run, and which is intended to be declared navigable.

The said board shall cause an examination of the water course intended to be declared navigable, to be made by some suitable person, who shall ascertain and report to said board the length of the same, and how much thereof is capable of being declared navigable, which report, if in the opinion of said board, satisfies them of the said stream being of public utility, as a navigable one, the said board shall confirm said report, and cause the same to be recorded on the records of said board, as public highways are recorded.

The supervisor of the road district through which said water course may run, shall take charge thereof, as a part of his general duties as supervisor of public highways, and for the purpose of keeping the same in a navigable order, said supervisor shall annually call out for two days the inhabitants of said district, liable to work upon the public highways, who shall work on and clear out the timber and other obstructions that may obstruct the navigation thereof.

Any person obstructing any water course declared navigable, shall be liable to the same pains and penalties of persons guilty of obstructing public highways, and the

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(171) 1 G. & H. pp. 421, 422.

general laws governing roads and public highways and the laying out and working thereof in all other respects, shall be the law governing the laying out and working of navigable water courses.

The declaration of navigable water courses as navigable, by said county board, shall not affect any mill nor any dam, aquaduct, viaduct, bridge, or machinery which has been, or may hereafter be established on said stream.

The boards of commissioners of the several counties shall have power to appropriate from the county treasury such sums of money as they may deem necessary, not exceeding two hundred dollars, to remove obstructions from such streams, as have been heretofore declared navigable by law, or may be hereafter declared navigable, under the provisions of this act; and to require the supervisor of any district through which such streams may run, to call out the hands in such district as many days, besides the two days mentioned in the third section of this act, as may be necessary to remove obstructions from such streams: *Provided*, That no person shall be required to work more than four days.(172)

35. That the county commissioners of any county in this State may, at their option, authorize and direct the subscription to and preservation of the public newspapers printed in their county.

Upon a certified order to that effect, the recorder of such county, or person doing the business of recorder shall subscribe for one of each of the newspapers of a political or miscellaneous character published in his county, file the same in his office and cause said newspapers to be substantially bound, from time to time, in volumes of a convenient size, to be kept in his office for the use of the inhabitance of this State who shall, at all times during office hours, have access to the same free of all charge and expense.

The subscription price and expense of binding and preservation of such newspapers shall be paid out of the

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(172) 1 G. & H. pp. 442, 443.

county treasury, and the accounts therefor be audited and allowed in the same manner that other accounts are.(173)

The importance of preserving the papers containing legal advertisements is apparent to all, and is a matter of great interest to the people of every county in the State, and the different boards of commissioners of each county should not overlook this duty.

36. When a recorder of any county of this State has neglected to make out a general index to all deeds and mortgages on record in his office, he should do so at once, and the board of commissioners of his county must compensate him for his labor out of the county treasury at the rate of fifteen cents per hundred words.(174)

37. Whenever any bridge company has abandoned any bridge, or when the right to take toll has expired, may expire, by limitation of the charter thereof, it shall be lawful for the commissioners of the county in which such bridge may be situated, to require the same, and the grades thereof, to be repaired, if they shall deem that the public good requires it; and for this purpose they have all the powers given to them for the erection and repair of other bridges.

38. They may cause toll to be collected on any such bridge or bridges, and they may, at their discretion, authorize any bridge company whose charter, or right to take toll, has expired, to repair such bridge and grade, and take such toll as such commissioners may from time to time fix for that purpose. But in no case can toll be charged on any bridge erected or repaired under the act approved March 3, 1855, of persons going to or returning from any election, religious meeting, or attending a funeral.(175)

39. That the board of county commissioners in any county may, at their option, allow on silk raised in the county, at the following rates, namely: for every pound of cocoons, fifteen cents; for every pound of reeled silk, twenty-five cents, on the following conditions:

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(173) 1 G. & H. pp. 444, 445. (174) 1 G. & H. p, 531. (175) 1 G. & H. pp. 202, 203, 204.

Any resident of the State may present to any justice of the peace of the county in which he resides, one pound or more of good, dry, silk cocoons, or of well reeled silk, and if such resident shall, by his own oath or that of any other credible person, establish to the satisfaction of such justice that the cocoons presented were raised in such county, or, as the case may be, that the silk was reeled in such county from cocoons raised within the State, and that no portion of such cocoons or reeled silk had before been presented to any justice for examination and certificate, such justice shall issue his official certificate, specifying the number of pounds of cocoons or reeled silk presented, the date, the owner's name and residence, and the names, if any, of the testifying witnesses, which certificate shall be to the board of county commissioners sufficient evidence of the facts therein stated, and shall be retained and filed by such board; and no bounty shall be allowed by such board, except in pursuance of such certificate.(176)

40. They may, on presentation of a petition in writing, signed by not less than one-third of the qualified voters of any territory, cause the same to be incorporated as a town. (177) [See post pages.]

41. Whenever any incorporate town shall desire to annex contiguous territory thereto, not platted, the board of commissioners of the proper county, on presentation by the trustees of said town, of a petition asking for such annexation, &c., may annex the same to said corporation.(178) [See post page.]

42. That the several boards of county commissioners within this State be, and they are hereby authorized and required to procure for their respective counties, and at the expense of the same, a set of the following measures and weights for the use of their county; that is, one measure of one foot, or twelve inches English measure, so called; also one measure of three feet, or thirty-six inches, as aforesaid; also one half bushel measure for dry measure,

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(176) 1 G. & H. p. 572. (177) 1 G. & H. p. 621. (178) 1 G. & H. p. 630.

which shall contain one thousand and seventy-five and one-fifth solid inches; also one gallon measure, which shall contain two hundred and thirty-one solid inches; which measures are to be of wood or any metal the court may think proper; also one set of weights commonly called avoirdupois weights, and sealed with the name or initial letters of the county inscribed thereon; which weights and measures shall be kept by the county auditor of each and every county in this State for the purpose of trying and sealing the weights and measures used in their counties.

As soon as the several boards of county commissioners shall have furnished the weights and measures as aforesaid, they shall cause notice thereof to be given at the court house door for one month, and any person or persons desirous of having his, her or their weights and measures tried by the county standard, shall apply to the county auditor, of the county in which he shall live, and if they correspond with the standard, the county auditor shall seal them with the seal provided for that purpose.

That sixty pounds of wheat (avoirdupois weight) shall be given and taken for a standard bushel; of shelled corn, fifty-six pounds; of corn on the cob, sixty-eight pounds; of buckwheat, fifty pounds; of beans, sixty pounds; of potatoes, sixty pounds; of clover seed, sixty pounds; of hemp seed, forty-four pounds; of blue grass seed, fourteen pounds; of castor beans, forty-six pounds; of dried peaches, thirty-three pounds; of dried apples, twenty-five pounds; of onions, forty-eight pounds; of salt, fifty pounds; of mineral coal, mined without, and sold within the State, eighty pounds; of coal mined within the State, seventy pounds; of timothy seed, forty-five pounds; of rye, fifty-six pounds; of barley, forty-eight pounds; of corn meal, fifty pounds; and two thousand pounds of hay shall be given and taken for a ton.

All the different kinds of grain, seeds and articles specified above, shall hereafter be given and taken at the several weights affixed to each, as a standard bushel; and as such shall be considered a legal tender to fulfil any contract

heretofore made for the delivery of either of the kinds of grain, seeds or articles specified above.(178)

43. The board of County Commissioners must fill all vacancies in county or township offices, except justices of the peace and such township or other offices the vacancy in which are otherwise provided for; and such appointment shall expire when a successor is elected and qualified, who shall be elected at the next general or township election, as the case may be, proper to elect such officer. A vacancy occurring pending a contested election shall be filled as other vacancies until such contest is decided, or the office otherwise filled. A person temporarily filling a vacancy shall give such bond, take such oaths, have the same rights and perform the same duties as the officer whose place he fills.(179)

44. That the commissioners of each county may cause to be paid out of the county treasury a sum not exceeding five dollars, to any person who shall exhibit to them a wolf scalp, and take and subscribe an oath that the wolf to which such scalp belonged was killed in the county, and that no reward therefor has been paid him out of such treasury; but no more than one dollar and fifty cents shall be paid for the killing of any wolf under the age of six months; and such commissioners shall cause all such scalps thus exhibited to them to be immediately destroyed.(180)

45. The Board of Commissioners of the several counties may authorize the auditor of their respective counties to sell and make conveyances for any lands owned by such county and prosecute suit for collection of the purchase money therefor. For all services touching such agency such board shall allow such auditor reasonable compensation.(181)

46. They may on petition locate and establish, change and vacate highways.(181)

47. That in any county where the whole fees allowed by law to the clerk, sheriff, auditor or treasurer amounts in the

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(178) 1 G. & H., 674; Act of 1863, p. 40. (179) 1 G. & H., 671 and 672. (180) 1 G. & H., p. 675. (181) 1 G. & H., p. 677. (181) 1 G. & H., p. 359; Act of 1867, p. 131.

aggregate to less than one thousand dollars per annum, the Board of Commissioners may, in their discretion, allow such officers such an amount as they in their discretion may deem just and proper, but such allowance shall not exceed three hundred dollars to any officer in any one year.(182)

48. Their fees for each day's attendance as members of the county board or Board of Equalization, they are each entitled to receive five dollars.(182)

49. They must allow the coroner for impanneling and summoning a jury and witnesses and making and returning inquisition for view of each body for first day, $10.00; for each additional day, $5.00; jurors fees before coroner $1.00.

50. They must allow the Township Trustees for each actual day's service, to be paid out of the township fund, $3.00. But in estimating the number of days portions of days less than one-half shall not be counted; and portions of days greater than one-half shall be counted as a whole day.(183)

51. But they can make no allowance for any service rendered by any county officer in a criminal cause, nor for any service rendered in a civil cause, when no provisions of law authorizing such allowance and payment for extra services, as such officer, nor for deputy hire.(183)

52. The Board of County Commissioners, Auditor and Assessor must meet at the seat of justice of each county on the first Monday in June annually, and shall when so met constitute a County Board of Equalization for both real and personal property listed for taxation.(184)

53. The County Assessor's fees must be allowed by the board, also their deputies—Assessors for each day actually employed, $4.00; Deputies, $3.00.(185)

54. They must instruct the auditor in case of a delinquent county treasurer, or when a treasurer refuses or neglects to pay over all moneys as provided in the act approved December 21, 1872, to bring suit on his official bond.(186)

55. They are authorized to correct mistakes made by the

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(182) Act approved March 8, 1873. (183) Act approved March 8, 1873. (184) Act approved December 21, 1872. (185) Act of March 8, 1873. (186) Act approved December 21, 1871, sec. 185.

county treasurer in paying over or accounting to them for money. (187)

56. They may render an excuse for the treasurer's failure to pay over to the Auditor of State money due the State. (188)

57. They can, on presentation of a petition, and after a legal election by the qualified voters, appropriate money from a township in their county, or for their county, to aid a railroad company to construct its road through said township or county.(188) See *post*, p. —.

58. They can, also, on petition filed by one hundred freeholders of any county, or twenty-five freeholders of any township, appropriate money to aid a railroad company in an adjoining State to construct a road near the State line, the money to be appropriated from the township and county, after there has been an election held in such county or township resulting in favor of the appropriation.(189) See *post*, page —.

59. They have jurisdiction in all contested election cases for county and township officers. Also in cases of contest for the office of judge of the circuit court and prosecuting attorney. But where the contest is for a district office and the district is composed of two or more counties, the board in the county giving the largest number of votes for said officer has jurisdiction only.

There is a typographical error in section 16 of the Act approved May 4, 1852. It should be, "*and the contest for district and circuit offices, not otherwise provided for in this act, shall be tried in the county giving the largest number of votes for said officer.*" But as the trial and proceeding in all contested election cases is the same, for information in such cases see *ante*, page —.(190)

60. Whenever any person or persons, body politic or corporate, shall appear before the Board of Commissioners of any county in this State, and establish by proper proof that such person, body politic or corporate has paid any amount

(187) Act approved December 21, 1872, sec. 187. (188) Act approved December 21, 1872, sec. 286. (188) Act of 1869, Special Sess., p. 92. (189) Act approved December 14, 1872, p. 49. (190) 1 Res. by G. & H., p. 318.

of taxes which were wrongfully assessed against such person, body politic or corporate in such county, it shall be the duty of said board to order the amount so proved to have been paid to be refunded to said payer from the county treasury, so far as the same was assessed and paid for county taxes. And when the amount so wrongfully assessed shall be for State purposes, after hearing the proof, if the board is satisfied that the complaining party has been wrongfully assessed, and that he has actually paid taxes that he was not bound to pay under the law, they must certify the same to the Auditor of State, who will audit the same against the State Treasurer.(191)

61. They must, when the State has lost any amount of tax by reason of the default of the assessor, treasurer or auditor of their county, in the discharge of the duties imposed upon them by any of the provisions of chapter six of the act of 1852, add such loss to the next years' taxes of their county, and cause the same to be paid into the State treasury.(192)

62. They must contract with one or more skillful physicians having knowledge of surgery, to attend upon the prisoners confined in jail, or paupers in the county asylum, and may also contract with physicians to attend upon the poor generally in their county; and no claim of a physician or surgeon for such services shall be allowed by such board except in pursuance of such contract. But the overseers of the poor may employ such medical or surgical service as the paupers of his township may require, and the county will be liable for the services so rendered.(193)

63. That it shall be the duty of the board of commissioners of the different counties in this State to direct by an order entered on the order book of said board of commissioners, what kind of animals shall be allowed to pasture or run at large upon the unenclosed land, or public common within the bounds of any township in their respective counties.

The board of commissioners of the different counties of

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(191) 1 G. & H., p. 110. (192) 1 G. & H., p. 113, sec. 198. (193) 1 G. & H., p. 64 and 499, sec. 27.

this State shall specify in said order, by name the kind of animals that shall run at large or pasture upon the unenclosed land or public common within the different townships in the county, and also what particular class of the said kinds of animals, whether male or female, and of what age shall be allowed to so run at large.(194)

64. They may, either in vacation or in regular session, meet and approve the official bonds of the clerk of the circuit court, sheriff, coroner and county recorder; in doing this they must indorse their approval on their bonds and each commissioner sign it.(194)

65. When any new county shall have been formed out of the territory lying in whole or in part within the limits of any other county, it shall be the duty of the board of the county so formed to procure a suitable book, and to cause to be therein copied from the record of the recorder's office of such other county or counties, all deeds of real estate within such territory that shall have been recorded before the organization of such newly formed county.(196)

66. In case any canal company shall fail to build or repair any bridge across the canal of said company as required by law, the board of commissioners of the county in which the bridge should have been built, must bring suit in their corporate name against the delinquent company. (197)

67. The board of commissioners of Marion county are authorized by the act approved March 7, 1867, to make an appropriation from their county to aid in the construction of the widows' and orphans' asylum of Indianapolis.(198)

68. Every county shall relieve and support all poor and indigent persons lawfully settled therein, whenever they shall stand in need thereof, and the board of county commissioners may raise money for the support and employment of the poor in the same way and manner as in the forty-sixth section of this act is provided.

Legal settlements may be acquired in any county, so as

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(94) Act 1851, p. 90; Act special session 1865, p. 278. (196) 1 G. & H., p. 194. (197) 1 G. & H., p. 204. (198) Act 1867, p. 229.

to oblige such county to relieve and support the persons acquiring such settlement, in case they are poor and stand in need of relief, as follows:

A married woman shall always follow and have the settlement of her husband, if he have any within the State, otherwise her own at the time of marriage, and if she then had any settlement, it shall not be lost or suspended by the marriage; and in case the wife shall be removed to the place of her settlement, and the husband shall want relief, he shall receive it in the place where his wife shall have the settlement.

Legitimate children shall follow and have the settlement of their father, if he have any within the State, until they shall gain a settlement of their own; but if the father have no settlement, they shall in like manner, follow and have the settlement of their mother, if she have any.

Illegitimate children shall follow and have the settlement of their mother, at the time of their birth, if she then have any within the State; but neither legitimate nor illegitimate children shall gain a settlement by birth in the place where they were born, unless their parent or parents had a settlement therein at the time.

Every male person, and every unmarried female over the age of twenty-one years, who shall have resided in any county in this State one whole year without interruption, shall thereby gain a settlement in such county.

Every minor whose parent, and every married woman whose husband has no settlement in this State, who shall have resided one whole year without interruption, in any county in this State, shall thereby gain a settlement in such county.

Every minor who shall be bound as an apprentice to any person, shall, immediately upon such binding, if done in good faith, thereby gain a settlement where his or her master or mistress has a settlement.

Every settlement, when once legally acquired, shall continue until it shall be lost or defeated by acquiring a new one in this state, or by willful and uninterrupted absence from the county in which such legal settlement had been

gained, for one whole year or upwards; and upon acquiring a new settlement, or upon the happening of such willful and uninterrupted absence, all former settlements shall be defeated and lost.

To raise the sum necessary for the purchasing of land and the erection and furnishing of the buildings for such asylums, the boards of county commissioners in the several counties shall have power to assess a tax on property liable to be assessed for raising a county revenue, not exceeding one-fourth in addition to the rates at which such property may be assessed by the existing laws.

So soon as the necessary provisions may be made by the erection of suitable buildings, the said board shall direct and order that all persons who have become permanent charges as paupers on the county, be removed to such asylum, and shall take such measure for the employment and support of such paupers as they may deem advisable; and thereafter the overseers of the poor shall, from time to time, as persons may become permanent charges to their respective townships as paupers, have such persons removed to the said asylums.

Such superintendent or superintendents shall give bond, with freehold security, to said board in the penalty of five hundred dollars, conditioned for the faithful discharge of his or their duty; and he or they shall make to such board at their sessions in the spring and fall, annually, a detailed report in writing, of the time and manner of the admission of each pauper; their health and fitness to labor; the results of their industry, and the expenses incurred, and it shall be the duty of the members of such board, in person, annually to inspect said asylum with regard to its fitness, in all respects, for the objects of its establishment.

Whenever it shall be necessary and practicable, poor children of the asylums who cannot be bound out, or whom it may not be expedient to bind out as apprentices, shall be educated thereat.

It shall be the duty of the superintendent or superintendents of any asylum erected or established by law, to superintend and direct the education of such poor children,

according to the preceding provisions of this act, and for the purpose of carrying the same into effect, with the least possible expense, it shall be the duty of said superintendent to send them to the common school in the township in which the asylum is situated, during the continuance of its session.

Any asylum or farm, provided by the board of county commissioners for the poor, may be discontinued by such board and the property, real and personal, relating thereto, which belongs to the county, may be sold, leased, or otherwise disposed of, or applied in such manner as may be best for the interests of the county.

The boards of county commissioners of the several counties in this State may, if they deem it expedient, annually, at their session at which the county tax is ordered to be levied and assessed, levy and assess a tax for the support of the poor of their respective counties, on objects from which the county revenue is or may be directed to be raised; the tax hereby authorized to be laid shall be collected by the same officers whose duty it may be to collect the State and county revenue, who shall pay the same accordingly into the county treasury.

The board of county commissioners of any county may, in their discretion, appoint a board of visitors annually, to consist of one person from each township in the county, or a less number of persons, as they may think best, to visit, at least once during the year, the assylum of such county, and report to the commissioners its condition, and the treatment, management, and condition of the inmates thereof.

Such visitors shall receive such compensation as the board shall adjudge reasonable.(199)

The several Boards of County Commissioners are authorized, in their discretion, upon proof satisfactory to them being made that any resident of the county has lost his or her eye-sight, or by casualty has become otherwise unable to support him or herself by reason of bodily infirmity, and

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(199) 1 G. & H., p. 493.

that he or she has a wife or husband, as the case may be, and is an object of public charity, to make an order that the county treasurer pay over such sums of money to such persons, or to any person having the keeping of such persons, out of the funds of their respective county, as they may deem necessary and proper for his or her support, so as not to separate them from their family by being placed in the county poor-house.(200)

69. That there shall be established and kept in every county, by authority of the Board of County Commissioners, and at the expense of the county, a prison for the safe keeking of prisoners lawfully committed.

The grand jury, at each term of the circuit court, shall make personal inspection of the condition of the county prison, as to the sufficiency of the same for the safe keeping of prisoners, their convenient accommodation and health, and shall inquire into the manner in which the same has been kept since the last term; and the court shall give this duty in special charge to such grand jury, and it shall be imperative upon the Board of Commissioners to issue the necessary orders, or cause to be made the necessary repairs, in accordance with the complaint or recommendation of the grand jury.(201)

70. They may vacate streets and alleys on petition of an individual or a corporation interested in such vacation. See *post*, p. —.(202)

71. The Board of County Commissioners in each county in this State may lay off and divide their county into any number of townships that the convenience of the citizens may require, accurately defining the boundaries thereof, and may, from time to time, make such alterations in the number, name and boundaries of such townships as they may deem proper. They must enter the description of the boundaries of such townships at full length on their record, and also all alterations in such boundaries, and all new and additional townships which may be formed.(203)

71. That whenever any map or plat of lots or lands de-

(200) 1 G. & H., p. 496; Act of 1857, page 18. (201) 1 G. & H., page 410. (201) 1 G. & H., page 362. (203) 1 G. & H., page —.

posited in the office of any county auditor or recorder, shall have become so worn or defaced as to be unfit for use or reference, it shall be the duty of such officer having charge of the same to make or cause to be made, a new copy of such map or plat, which copy shall correspond with the original so far as the same can be deciphered, and if any part thereof be illegible, said officer shall resort to the most authentic sources to supply and fill up the same; and said map or plat shall be used for reference, and in all respects have the same legal bearing and effect as the original map or plat. It shall also be the duty of county auditors to take copies of such maps or plats in the recorder's office as may be necessary for the discharge of their official duties.

The county boards shall make such allowances to officers of their respective counties, for such services, as shall be sufficient to compensate for the same.(204)

72. That the Board of County Commissioners in any county may appoint inspectors, to serve during four years, unless sooner removed by such board, to inspect within the said county when required, the following articles: salt, beef, pork, flour, tobacco and hay.

All barrels, hogsheads and bales inspected shall be branded with the name and residence of the inspector.

Such boards may authorize inspectors of hay to procure, at expense of the county, suitable hay scales

And they may make such regulations in regard to the inspection as they may deem necessary.(205)

73. In case the auditor of their county is unable to attend to the duties of his office during any term of the Board of Commissioners, and has no deputy, or has a deputy and he is unable to attend, they may appoint a deputy, who shall perform the duty of the auditor for the time being.(206)

74. They may make allowances to widow women, old people and children for witness fees in State prosecutions. (207)

75. Whenever the surplus revenue fund belonging to the common school in any county in this State, or any part of

(204) 1 G. &. H., p. 123. (205) 1 G. & H., p. 402. (206) 1 G. & H., page 402. (207) 1 G. & H., page 64.

such fund, has, by any means, become invested or changed into real estate, the Board of Commissioners of such county are authorized to dispose of the same by sale in such a manner as may seem best for the interest of the common school fund, and to receive and invest the purchase money according to law.(208)

76. In case the trustee of any township shall fail to divide his township up into proper road districts, the Board of Commissioners of the county may do so.(209)

77. They must direct the auditor of their county to issue fee bills for all costs made in cases tried before them.(210)

78. That, when any public road or highway, running or passing along the bank of any stream or water-course, shall, by the falling or washing away of the bank of such stream or water-course, become unsafe, or inconvenient for use as a public highway, it shall be the duty of the supervisor of highways having such road in charge forthwith to give the owner or occupant of the land over which said road passes notice to remove his fence back from the bank of such stream or water-course, far enough to admit of the opening and construction of a road at least forty feet wide; and if the owner or occupant of such land should neglect to remove said fence, as required by such notice, it shall be the duty of such supervisor to call out the hands liable to work on roads in his road district, and forthwith remove such fence, doing to the owner or occupant no greater damage than is necessary for the removal of such fence.

That if any dwelling house or building should stand so near said stream or water-course, so that a sufficient space is not left for such road, then such supervisor may open said road in the rear of such dwelling house, or other building.

When said fence shall be removed, or road changed to the rear of buildings, as aforesaid, then the owner of such land may file with the board of commissioners of the county where the same is situated, a claim for damages for

(208) 1 G. & H., page 568. (209) 1 G. & H., p. 592, sec. 23. (210) Act of 1863, p. 45; Act of Special Session 1865, p. 128.

the removing of said fence, or the change of such road, and for the use of the ground over which said road shall pass; and upon the filing of such claim, it shall be the duty of such board of commissioners to appoint two reputable freeholders of such county to view such premises, and assess the damages of such claimant, by reason of the appropriation of his said land for said road, and the removal of said fence.

Such viewers shall be sworn to faithfully and impartially assess the damages of such claimant, and upon actual view of such premises, assess such damages, and report the same to such board of commissioners, and such board of commissioners may allow, and order the same to be paid out of the treasury of such county; or, if they deem such assessment to be too high, they may, in their discretion, appoint reviewers to make said assessment, who shall be sworn, and proceed in like manner to assess such damages, and report the same to such board, and said board shall order the amount of such assessment to be paid out of the treasury of such county.

If such claimant shall feel aggrieved by such assessment, he may demand a review of such premises, and a new assessment of such damages, whereupon said board shall appoint reviewers, as aforesaid, who shall review such premises, and re-assess such damages; but if said re-assessment shall be for no greater sum than the first assessment, said claimant shall pay the cost of said review.(212)

79. That any street or horse car railway company organized under the laws of the State of Indiana, and operating such road within any of the incorporated towns or cities of the State, and desiring to extend their road beyond such town or city limits, on any State or county road, or other public highway, may do so after procuring the consent of the board of county commissioners of such county. (311)

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(211) Act of Regular Sess. 1865, p. 131. (212) Act of 1865, p. 131. (213) Act of 1867, p. 131.

80. That any person, or persons, through whose land any State, county, or township highway heretofore located and established, or hereafter to be located and established, may run, may petition the board of commissioners of the proper county for permission to change the location of such highway on his, her, or their own land, or on the lands of any other person consenting thereto.

Every such petitioner, or petitioners, shall give notice of his or their intention to file such petition, by posting written or printed notices thereof, in three or more public places in the vicinity of such proposed change.

Upon the filing of such petition, and proof of notice as aforesaid, the board of commissioners shall appoint three disinterested freeholders of the county, as viewers, who shall meet at such time as they may appoint, and after having been duly sworn, or affirmed, shall proceed to view the premises, and they, or a majority of them, shall report the respective distances of the established and proposed highway, and the situation of the ground along each, and whether or not, in their opinion, the public will be materially injured by such proposed change, and shall file their report with the county commissioners, at their next session thereafter.

Upon the filing of such report, and before action thereon, if the report be favorable to such change, any freeholder may file his remonstrance against the same, stating therein the reasons why such change ought not to be made, and an issue may be made thereon; and if the report of the viewers be unfavorable to such change, the petitioner, or petitioners, may make an issue thereon, any such issue shall be tried before the board of commissioners, as other issues of facts are tried, and if, upon the report of the viewers, or upon any issue tried as above, the board shall be of opinion that the public will not be materially injured by such proposed change, they shall make an order granting permission to the petitioner, or petitioners, to make such change, and upon satisfactory proof, then or thereafter, that the new road has been opened and improved, equally convenient for travelers, the board shall make an order va-

cating so much of the former highway as lies between the different points of intersection.

All the costs of such proceeding shall be paid by the petitioner, or petitioners: *Provided*, that when a remonstrance is filed, and the issue found against the remonstrant, he shall pay all the costs occasioned thereby. (213)

SEC. 1. The boards of commissioners of each county of this State in which by popular ballot the people have heretofore declared in favor of the payment of a bounty to such of the soldiers of said county as enlisted and entered the service of the United States for the term of three years or during the war of the late rebellion, and were duly accredited to said county, are hereby authorized and empowered to issue bonds or orders to such of said soldiers as have been honorably discharged from said service, and to the legal representatives of such soldiers who so enlisted and were accredited as above, and who were killed or died while in said service, and to the legal representatives of such of said soldiers as have died since their discharge from said service, for one hundred dollars, less the amount already received as bounty from such county by said soldier, his heirs or representatives, on account of such enlistment and credit.

SEC. 2. Such bonds or orders shall be issued by said board at their next regular meeting after the filing and proof of the claim for such bounty, and shall be made payable within at least eighteen months after the date thereof, and shall bear six per cent. interest from the date thereof.

Provided, however, That the provisions of this act shall apply only to counties in which the commissioners, under instructions by popular ballot, have actually heretofore prepared bonds for the whole or a part of the persons to be benefited by this act, within their county, and where such bonds were afterwards destroyed, before delivery to the parties for whom they were intended; *and provided further*, that the provisions of this act shall not apply to any county which shall have fully paid such bounties to all soldiers filling the quota of such county according to the terms of

(213) Act 1867, p. 131.

the order of the board of commissioners allowing such bounties before the passage of this act.

The board of commissioners of such counties are hereby authorized and empowered to make an assessment and levy of taxes, and provide such other ways and means for the payment and redemption of such bonds and orders as said board may deem just and advisable, such taxes to be collected at the same time and in the same manner that other taxes are collected. (217)

82. In any county where the whole fees of a clerk, auditor, or treasurer amount in the aggregate to less than one thousand dollars per annum, the board of commissioners may allow such officer such an amount as they in their discretion may deem just and proper, but such allowance shall not exceed three hundred dollars for any one officer for any one year.(218)

82. When two only of the members shall attend the meeting of the board, and a division shall take place on any question, it shall be continued until the next meeting before it shall be finally determined.

84. They must cause to be recorded in a book kept for that purpose, the proceedings and their determinations touching all matters properly cognizable before them, and all books, accounts, vouchers, papers and documents touching the business or property of the county, shall be carefully kept by the auditor, and open to the inspection of any person. They must sit with open doors. The auditor of the county must attend all their meetings, and must keep a correct record of all their proceedings. They being a court of limited jurisdiction, their record must show that their acts and proceedings have been in strict accordance with the law. They can speak in no other way save by their record. Each day's proceedings should be entered at length in their record and signed by each member of the board, at the close of the proceedings. They are a court of record under our statute.(220) They must use a common seal.

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(217) Act 1873, pp. 47, 48. (217) Act approved March 8, 1873. (120) 5 Black. 325; 3 Ind. 497; 15 Ind. 250; 1 G. & H. p. 249, secs. 7, 8, 10, 14, 15.

CHAPTER VIII.

FORMS.

The powers and duties of the Board on petition to declare any Town in their County a body corporate.

The board of commissioners have power to declare any town within their county a corporation. But in order to enable them to do this the citizens of the territory intended to be incorporated, must cause an accurate survey and map to be made of all the territory intended to be embraced within the corporate limits of such town, the survey must be made by a practical surveyor, and must show the course and distance of the boundaries of the said territory. It must also show the exact quantity of land intended to be included in the corporation, the accuracy of such survey and map shall be verified by the affidavit of such surveyor, written thereon or annexed to the map. They must also, not more than thirty, nor less than twenty days, before the time of the presentation of the petition to the board of commissioners, cause an accurate census to be taken of the resident population of such territory, which census shall show the name of every head of a family residing within such territory on the day or days the census are taken, and the number of persons belonging to each family.

The truth of the report of the census taken must be supported by the affidavit of the person taking the same.

Form of surveyor's affidavit:

STATE OF INDIANA, }
Vermillion County, } ss.

M. G. R. being duly sworn, upon his oath, says that he is a practical surveyor, and that he did on ——— day of ———, 1872, survey a certain piece of land situated in section 8, township 17 north, range 9 west, in Vermillion county, Indiana, and that the above map shows the correct course and distance of the boundaries of said territory or

piece of land, and that the aforesaid tract of land contains six hundred and forty acres. M. G. R.

Subscribed and sworn to before me, this —— day of ———, 1872.

——— ———, J. P. [SEAL.]

Form of census-taker's affidavit:

STATE OF INDIANA, } ss.
Vermillion County. }

John Smith being duly sworn, upon his oath, says he did on —— day of ———, take the census of a certain territory situated in section 8, township 17 north, range 9 west, in Vermillion county, Indiana, bounded as follows: commencing at the southeast corner of the section, township and range aforesaid, running thence west one mile, thence north one mile, thence east one mile, thence south one mile, to the place of beginning, and that the above report shows the correct number of the population of said territory and the head of each family residing in the same.

JOHN SMITH.

Subscribed and sworn to before me this —— day ——— 1872.

——— ———, J. P. [SEAL.]

After the survey map and census report have been completed and verified, they must be left at some convenient place within the territory intended to be incorporated for examination by those having an interest in the application for a period of not less than twenty days before the filing of the petition with the board. At the expiration of the twenty days, a petition must be gotten up and signed by the applicant, and also by not less than one-third of the whole number of qualified voters, residing within such territory, the petition must set forth the boundaries of the territory, the quantity of land embraced in the same, according to the survey and the resident population according to the census thus taken, and the petition must have attached thereto, or written upon it, an affidavit verifying the fact as alleged therein.

Form of the petition.

To the Honorable Board of Commissioners of Vermillion County:

We, the undersigners, would represent to your honors, that we are legal voters of Vermillion county, Indiana, and that we reside in the following territory of land, situated in the county and State aforesaid, which, according to the survey made by M. G. R. a practical surveyor, on —— day of ———, 1872, bounded as follows, commencing at the south-east corner of section 8, township 17 north, range 9 west, running thence west one mile, thence north one mile, thence east one mile, thence south one mile to the place of beginning, containing six hundred and forty acres. This territory, according to the census taken by John Smith, on —— day of ———, 1872, contained fifteen hundred resident population. We, therefore, pray your honors that you make an order declaring said territory with the assent of the qualified voters of said territory to be an incorporated town by the name of Toronto, and we will ever pray.

JOHN SMITH, SETH WHITE,
THOMAS JONES, HENRY JONES.

STATE OF INDIANA, }
Vermillion county. } ss.

John Smith, being duly sworn, upon his oath, says that the facts set forth in the above petition are true.

JOHN SMITH.

Subscribed and sworn to before me this —— day of ——, 1872.

J. P., [SEAL.]

On the presentation of this petition to the board have the auditor to mark it filed. You must then make proof by affidavit or otherwise that the petition was signed by not less than one-third of the qualified voters of the territory proposed to be incorporated; that the survey map and census report are left at some convenient place in said territory for examination by those having an interest in the application more than twenty days before the filing or presentation of the petition. And if on examination of the petition, and after hearing the proof the Board of Commissioners

are satisfied that the requirements of the statute have been fully complied with, they must then make an order declaring that such territory shall, with the assent of the qualified voters thereof, be an incorporated town by the name mentioned in the petition, which name must differ from that of every other town in this State. They must also designate in their order a day for the qualified voters, residents in said territory, to meet and hold an election; the day named must not be more than one month from the time the order is entered of record. The board must give ten days' notice of the time and place of holding such election by publication in a newspaper, if one be published in said territory, and by posting up copies of said notices, not less than ten in number, at the most public places in said proposed incorporated town. The law does not designate who shall put up the notices, but we think that the sheriff of the county is the proper man to perform this work.

Form of Notice:

NOTICE.

Notice is hereby given, that the board of commissioners of Vermillion county, Indiana, at their June term, 1872, on the petition of one-third of the qualified voters of a certain territory situated in section 8, township 17 north, range 9 west, in Vermillion county, Indiana, commencing at southeast corner of said section, running thence west one mile, thence north one mile, thence east one mile, thence south one mile, to the place of beginning, declared that such territory to be an incorporated town with the assent of the qualified voters of said territory, by the name of Toronto, and did then and there designate in their order the 10th day of July, 1872, as the day for the qualified voters of said territory to meet at the office of J. H., on out lot 6, in said town, then and there to take a vote whether said territory shall be an incorporated town by the name aforesaid. The voters of said territory will therefore take notice that the election will be held as aforesaid.

In witness whereof I have hereunto set my hand and affixed seal, this June, 1872. J. P. Y., Auditor. [Seal.]

At the time appointed for the holding of the election, the qualified voters must meet and elect three of their number inspectors, who, after being duly chosen and qualified by taking an oath to faithfully discharge their duties, they must then select one of their number as clerk of the board. They must without delay proclaim to the meeting that the poll is now opened, and that they are ready to receive the ballots of the voters. The voting must be by ballot, and they must have either written or printed upon them the word *Yes*, or the word *No*. If the majority of the ballots given shall have thereon the word *No*, the voters of such territory shall be deemed to not have assented to the incorporation thereof as a town, and no further proceedings can be had. But if the majority of the ballots given shall have thereon the word *Yes*, such territory shall from the time of pronouncing the verdict by the inspector of the election be deemed an incorporated town, to have a continuance thereafter by the name and style specified in the order of the board of county commissioners. And the inspector of such meeting shall make a statement showing the whole number of ballots cast at such meeting, the number having the word *Yes* thereon, and the number having the word *No* thereon, which statement shall be verified of such inspectors, and shall be returned to such board of commissioners at their next session; who, if satisfied of the legality of the election, must make an order declaring that said town has been incorporated by the name adopted, which order shall be considered evidence of such incorporation.(221.)

(221) 1 G. & H., p. 620–621. Act 1859, p. 209. Redden v. The Town of Covington, 229 and 118.

CHAPTER IX.

FORMS.

How Incorporated Towns may Annex Contiguous Territory that has not been Platted or Recorded.

The statute provides that whenever any incorporated town in this State shall desire to annex contiguous territory which has not been platted or recorded, the trustees of the town must present to the board of county commissioners of their county a petition, setting forth in such petition the reasons why they desire such annexation, accompanying the petition with a plat or map accurately describing by metes and bounds the territory proposed to be annexed; the correctness of such map or plat must be verified by affidavit of some person who is acquainted with the facts. The trustees must give thirty days notice of the time the petition will be presented to the board of commissioners, by publication in some newspaper published in such town, and if there is no paper published in the town, then by notice published in some newspaper of the county, and if there is no paper published in neither the town or county, then by posting up notices in not less than five public places in such town. Said notice should contain the description of the territory proposed to be annexed, giving its exact boundaries, and it would be safer to set out the names of the person or persons owning the land in such territory.

Form of petition:

To the Honorable Board of Commissioners of Vermillion county:

We, the undersigned, trustees of the incorporated town of Newport in said county, and State aforesaid, would represent to your honorable board that the aforesaid town desires to annex the following contiguous territory situated in said county, to her, to become a part and parcel of her incorporated territory, to be subject to the control of the trustees of said town in the same way and manner that the

territory now included in her corporated limits is subject, to-wit: Commencing at the southwest corner of lot No. 12, block five, in the town of Newport, running thence west one-quarter of a mile to a stake, thence south one-half mile to a stake, thence east one-quarter of a mile to a stake, thence north one-half mile to the place of beginning. The land thus proposed to be annexed belongs to J. H., that said territory has never been platted or recorded, except by order of your petitioners for this petition; that said town desires the annexation of said territory for the following reasons: 1. That it is necessary for the accommodation, growth and business of the town, &c. That the territory now proposed to be annexed to the said town of Newport has been carefully platted or mapped, (a copy of which is marked A, and attached hereto, and made a part of this petition) that the said map or plat describes accurately the territory proposed to be annexed by metes and bounds. We therefore pray your honors to make an order declaring said territory above described as being a part of the aforesaid incorporation.

J. B.,
J. A. B.,
F. M. B.,
H. H. } *Trustees.*

STATE OF INDIANA,
Vermillion County. } ss.

J. B., being duly sworn, upon his oath says, that the facts set forth in the above petition are true.

Subscribed and sworn to before me, this —— day ——, 1873.

———, J. P. [Seal.]

NOTICE.

Notice is hereby given that there will be a petition presented to the board of commissioners of Vermillion county, at their June session, 1873, by the trustees of the incorporated town of Newport, praying said board to annex to the aforesaid town the following contiguous territory, situate in Vermillion county, Indiana, described as follows, to-wit: (here give a full description by metes and bounds of the territory to be annexed.) That the above territory is

owned by J. H.(28) The annexation of the aforesaid territory is asked for the following reasons, to-wit: 1. It is necessary for the accommodation, growth and business of the town. 2. That said petition will at said session be presented and determined; of this fact all will take notice. (29) This May 1, 1873.

J. B,
J. A. B,
F. M. B,
H. H. } *Trustees.*

A copy of the notice must be served on the owner, or owners, of such territory.(21)

On the presentation of the petition to the county board, any person living in the incorporate town, or the adjacent territory that is proposed to be annexed, may appear and resist the prayer of the petition, or make any other defense known to the law. If the petition is insufficient or notice defective, or if any other proceeding required to be done has not been performed according to law, they can take advantage of that by motion, plea, or in any other method known to the practice. The board must sit as a court to determine any question that may arise in the case. They should take every question that may arise upon the pleadings, &c., in its proper order, and give it a careful consideration; and after inspecting the map and hearing the testimony, if they are of the opinion that the prayer of such petition ought to be granted, they must cause an entry to be made on the order book, specifying the territory annexed, with the boundaries thereof according to the survey, which entry, or an attestated copy shall be conclusive evidence in all courts of such annexation.(62)

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(28) The name of the owners need not be set out if the land is sufficiently described to identify it. 18 Ind. 203. But in order to prevent mistakes it is better to set it out. (29) 1 Res. G. & H. p. 630 secs. 51, 52. (31) 1 Res. G. & H. p. 630. (34) 1 Res. G. & H. p. 630, secs. 51, 52.

NOTE.—This was a proceeding by the authorities of an incorporated town to annex a territory, or to extend the corporate limits over additional territory. It may be fairly inferred from the notice and petition, that it was intended as a proceeding under the 51st section, p. 630, 1 Res. by G. & H., and it was ini-

tiated by the trustees of said town. The notice specified in said section, was given by publication in a newspaper; that, and the petition presented, each described the territory to be annexed by metes and bounds, and was then followed by this allegation, "containing the land of," &c., here giving the names of some thirty persons. The persons so named appear to have been made defendants. Upon the presentation of said petition to the board of county commissioners, a part of said persons appeared, for others a guardian ad litem was appointed—they being minors; others still were defaulted. The attorney who appeared for a part of said persons, also showed, by affidavit, that one Galay was not named in said petition and notice as being the owner of land in said named territory; was then and had a long time been the owner of a part of the said territory; and that his deed was duly of record; and that he was a non-resident of the county, being a resident of Switzerland county, and that he had not been notified of the said application. Upon this a motion was made to make him a party and continue, that he might be notified. This motion was overruled. An order was entered annexing said territory. From this an appeal was taken to the circuit court. There a motion was made, based upon said affidavit, to certify said case to the board of commissioners, that the said Galay might be made a defendant. The motion was overruled. An answer was then filed by a part of the defendants who had appeared in the commisioners' court, setting up the same fact as to said Galay by way of abatement. A demurrer was sustained to the said answer. It is not certain that a fair and reasonable construction of section 51 referred to, would exact from persons seeking to have territory annexed, the necessity of naming in the notice of such intended application each person owning parts of said territory if the same was otherwise therein so described and identified as to give such person notice that their interest was to be involved. In the case at bar the description of the territory sought to be annexed, as contained in the notice, is as follows: commencing at the north-west corner of Monfort's addition, etc., thence north on the half section line to the south side of the Michigan road, thence east to the west line of Hendricks' addition to, &c., thence south along said line to the north line of the original plat of said town, thence west to the place of beginning, containing the land of, &c. That part alleged to be owned by Galay, is stated to be a part of section 2, township 10, range 9, beginning on the line of donation to the town of Greensburg, eighty-one links east of the north-west corner of the plat of said town, at a stake in the Michigan road, thence north 122 poles to the line of donation, thence west 8 poles to the place of beginning. Was the publication of a notice, embodying the above statement of metes and bounds, sufficient to give jurisdiction of said Galay, containing at the same time the statement following, that the said described bounds contain the land of certain persons, among whom the said Galay was not named?

We think it was sufficient.

We have already intimated that it was not necessary in the notice to name the holders of the land intended to be embraced in such annexation. The description of territory by metes and bounds being sufficient in said notice. The additional allegation, therefore, professing to give the names of such land owners, in case at bar, having been made in such form as to be distinct and capable of separation from such description without impairing it, we think should be

treated as mere surplusage. It is insisted by the appellee that the appeal should be dismissed because errors are assigned only by a part of the defendants below, and the balance were not summoned and sued. The record shows that the appeal was prayed by all the defendants, and bond executed for all; in that shape the record was sent up. A part only assigns errors in this court. As to the balance who do not, the appeal will be dismissed for want of such assignment, as the same is equivalent to a declination to join in prosecuting the appeal further. *Per curiam*—The judgment is affirmed with costs.

Woodfill and others vs. The Town of Greensburgh, 18 Ind. 203.

This was a proceeding by petition, instituted by the Board of Trustees of the Town of Crawfordsville before the Board of Commissioners of Montgomery county, for the annexation to the said town of certain territory contiguous thereto, and not platted, or laid off, or recorded. The petition describes the territory sought to be annexed, is accompanied by a plat which also describes it, and which is verified by affidavit, and designates the person or persons to whom each piece of ground included within the bounds of said territory belongs. And further, the petition sets forth the reasons why such annexation is desired, which are in substance as follows:

1. The limits of the town as they now exist are such as to give great inconvenience to the citizens and officers of the town, and also make the burthen of taxation very unequal.

2. The present boundary, including the platted lots, divide the town into separate divisions, leaving property between the divisions thus formed, and in thickly populated parts of the town, entirely without said boundary, causing some of the streets to lie partly within and partly without said town.

3. There are at this time about sixty corners to the boundaries of the town, whereas, should the boundaries now prayed for be established the limits of the corporation would then be a rectangular parallelogram, and this parallelogram would be formed by including the extremes of the present corporation on the east and west and on the north and south, making it more convenient for the citizens and far easier for the officers of the corporation to perform their respective duties.

4. Many persons outside of the present corporation, and without the boundaries prayed for, have attached themselves thereto for school purposes, and it is but just that they should assist, by means of their taxes, in supporting said schools.

5. The corporation is in need of the increased revenue which would result from taxes levied upon the territory sought to be annexed, for the following purposes:

1. To provide more suitable and adequate means for the prevention of fires.

2. For the erection and keeping in repair of a suitable house for the convenience and advantage of the citizens of the town.

3. For the purpose of purchasing, laying out and regulating a suitable and convenient town cemetery.

Notice of the petition appears to have been duly published in a newspaper printed in said town, and a copy of the notice thus published appears to have been served on each of the owners of the respective pieces of ground embraced in the territory proposed to be annexed. The record shows that the commissioners, upon the final hearing, &c., ordered that such annexation be made, and from their decision there was an appeal. In the circuit court, to which the appeal

was taken, Isaac Elston, John Fisher and Ambrose Whitlock, the owners of part of the territory, appeared and moved to dismiss the cause upon two grounds:

1. The petition does not show sufficient reason for annexing contiguous territory.

2. That proper parties have not been brought before the court.

This motion the court overruled, and thereupon they answered the petition. The issues were submitted to the court, who found for the plaintiff, and having refused a new trial, rendered judgment, &c. Elston, Fisher and Whitlock appeals to this court.

The statutes relative to the incorporation of towns, &c., contain these provisions:

Sec. 50. "Whenever there shall be lots laid off and platted adjoining such town, and a record of the same is made in the recorder's office of the proper county, the trustees may, by a resolution of their board, extend the boundary of such town so as to include such lots, &c.

Sec. 51. "When any town shall desire to annex contiguous territory thereto, not platted or recorded, the trustees shall present to the Board of County Commissioners a petition setting forth the reasons for such annexation, and shall accompany the same with a map or plat accurately describing by metes and bounds the territory proposed to be attached, which shall be verified by affidavit; such trustees shall give thirty days' notice by publication in a newspaper printed in such town, &c., a copy of such notice shall be served on the owner or owners of such territory if known and are residents of such county." 1 Res. by G. & H., page 630.

This proceeding is based on section 51 just recited, but the appellant insists that that section is vague, indefinite and confers no right to proceed under it.

We think otherwise. By section 50, the trustees are empowered to annex by resolution territory adjoining the town which has been laid off into lots and platted, and the plat thereof recorded. And by section 51 the legislature plainly intended to confer power upon the Board of Commissioners, on petition of the trustees, to order the annexation to a town of any adjacent territory not embraced in section fifty; in other words, all such contiguous territory as was not included in a recorded plat. This construction seems to be correct, and being so the alleged vagueness of the section is not perceivable. The Mayor, &c., vs. Weems, 5 Ind. 547.

Another objection to the proceeding is, that the petition does not show sufficient reason for annexing the the territory. The statute requires the reasons for the annexation to be set forth in the petition. Without them it would be defective. In this case it seems to us they are sufficient. There is evidently enough of them; in our opinion they plainly show that the annexation sought was necessary for the accommodation of the growth and business of the town.

Again, it is said that the petition should be, but is not, verified by affidavit. There is nothing in this objection. The statute requires the map or plat to be verified, but not the petition itself. But there is another ground upon which the appellants rely for reversal. They contend that the parties directly interested have not been properly brought before the court. This, we think, is a mistake. The petition describes the territory sought to be annexed, designating the person or persons to whom each piece of ground included in the bounds of said terri-

tory belongs; and the record shows affirmatively that the publication required by the statute was duly made, and a copy of the published notice was served on the owners of said pieces of ground. The requirements of the statute as to the mode of bringing parties before the court appears to have been at least substantially pursued. If true, as stated in the appellants' brief, that the owners of one of the pieces of ground described as a part of the territory are designated in the notice of the application as the heirs of Anthony Hamilton, without giving their individual names, but the ground of which they were owners was described in the notice, and that being the case, it was not essential that each heir should be named. Woodfill vs. The Town of Greensburg, 18 Ind. 203.

Per Curiam.—Judgment is affirmed. Elston et al. v. The Board of Trustees of Crawfordsville, 20 Ind. 272.

CHAPTER X.

HIGHWAYS.

Highways, how Located and Established—Located and Changed.

A highway, under the English law, is a place over which a right is enjoyed by the public of walking, driving or riding, and it is often called the Queen's highway. But in this country the word highway seems to be used in a generic sense, and has a variety of significations and meanings. For it is used indefinitely as a name for all kinds of public ways, whether they be footways, carriageways, bridges, turnpikes, roads, railroads, canals, ferries, or navigable rivers. The right of way, or the privilege that members of society exercise over the property of an individual for the public good, was defined and understood at an early day after the organization of society. For as far back as sacred or profane history leads us, these rights seem to have been exercised, and highways to have been established. The principle upon which the right of eminent domain, or the right of the public to take and use the property of an individual rests, is upon the maxim that the rights of an indi-

vidual member of society must yield to the demands and claims of the whole community. When men enter into society they give up a part of their natural rights in order that they may be better protected in others. And under our republican form of government an individual is required, when he enters into society, to submit to all laws enacted by the majority of the adult men of the government in which he lives. As the government is organized for the purpose of regulating the conduct and actions of men in society, in order for it to accomplish and carry out the object of its creation, it must have the necessary means; and for the purpose of obtaining the necessary means, it must exercise a kind of supervisory power over both the person and property of all its subjects. And as every man has the right to move from place to place, for either personal enjoyment, or for the benefit and enjoyment of others, and also the right to transfer the products of his labor to market, and to carry on commerce and trade with all men in every section of the country, the question as to how this shall be done becomes a question of great importance both to the public and each individual of the community. For the way that might be the most convenient for the public to travel over the land of an individual might interfere materially with his private enjoyment. Hence there would at once arise a conflict of interest that must be adjusted. Under such circumstances it is the duty of the government to interfere and adjust the difficulty. And in settling the question, the claims of the public are considered as paramount to the claims of the individual. If this was not the case, society would be surrounded with innumerable difficulties. But in enforcing the claims of society the right of each individual should be respected and upheld as far as practicable, and the public should not encroach upon the rights of individuals, except in cases where public utility or necessity requires it. And in enforcing its claims, it should take no more property than is demanded of him by the exgencies of the community, and should do the least possible injury to the individual. The private interests and rights of an individual should never be sacrificed to a

greater extent than is necessary to secure to the public the required or necessary accommodation. The government, in the exercise of its supervisory power, is not authorized, and would be much less justified in taking the property of one individual and giving it to others. The rights of all should be equally respected, and each required to bear his proportional share of the burthen of taxation, and of the necessary expenses incurred in procuring for the public those rights and privileges that are so essential to the welfare and happiness of the members of society everywhere. This being the case, no individual should be required to surrender up to society or the public more than his proportional part. And if the interest of society demands of him more than this, he should receive in lieu of it something of equal value. And the framers of our National and State constitutions, for the purpose of protecting each individual in the enjoyment of his property, and for the further purpose of compelling each member of society to bear his proportional part of the burthen of taxation, and no more, incorporated into those palladiums of our civil rights the provision that private property shall not be taken for public use without just compensation.(200)

But the question very frequently arises as to the extent of the interest the public acquires in the land of an individual by the exercise of this superior power. Have they the fee-simple absolute, a life estate, or merely a lease of the land? The public, under such circumstances, has merely the right to use the land; or, in other words, they have acquired an "easement," which the owner of the land can not lawfully extinguish or unreasonably interrupt. But the soil and the freehold remain in the individual or owner, although incumbered with the way. And every use to which the land may be applied, and all the profits which may be derived from it consistently with the continuance of the easement the owner can lawfully claim.(190) And

(200) Article 1, sec. 21 of State Constitution, (1 G. & H.) Section 5 of the Amendment of the Constitution of U. S., 1 G. & H., p. 22.

For authorities on the points discussed above, see Edgerton and others v. Huff, 26 Ind., 35; Warie v. Smith, 5 pages chancery report, 137; The Trustees v. Rochester Railroad Company, 3 Hill, 567.

as soon as the public cease to use the right thus acquired, the remainder of the property reverts back to the original owner.(191.)

But the right to take private property for public use, which primarily belongs to the government, is frequently delegated to its numerous agents and officers, who are authorized to transact the business by virtue of an act of the law-making power. And the public may sometimes acquire this right by the use of the property, with the assent of the owner, for a certain length of time, and by this means raise in their favor a conclusive presumption of a right by dedication. And in this State there are three methods of acquiring this right. 1. By expressed grant. 2. By dedication, arising by presumption from a continued use of the place for a considerable period of time by the public as a public highway, with a knowledge thereof by the owner, and without objection on his part. 3. By order of the board of commissioners of the county.

The first one of the methods needs no comment, because the right of the public must rest upon his voluntary act; that act must be expressed in some public way. But the second method of establishing highways is one that is surrounded with almost innumerable difficulties, and has been the source of much bitter acrimony among neighbors, and the father of many hotly-contested law suits. We shall attempt, as far as the size of this work will admit, to discuss this question in such a way as to enable all to see what the public must do in order to acquire this right by this method. Prof. Greenleaf, in his able work on Evidence, says:

The existence of a public way is proved, either by a copy of the record, or by other documentary evidence of the original laying out by the proper authorities, pursuant to statute, or by evidence either of immemorial usage, or of dedication of a road to the public use. In the latter case two things are essential to be proved:—the act of dedication and the acceptance of it on the part of the public; and this may be either limited and partial, as

(190) 6 Mass., 453. (191) Varic v. Smith; 5 pages Ch. R., p. 137; 26 Ind., 35; 16 Ind., 338; 12 Ind., 74.

of a way excluding carriages, or it may be absolute and total. Nor is it necessary that the dedication be made specifically to a corporate body capable of taking by grant; it may be to the general public, and limited only by the wants of the community. If accepted and used by the public in the manner intended, it works an estopple *in pais*, precludes the owner, and all claiming in his right, from asserting any ownership inconsistent with such use. The right of the public does not rest upon a grant by deed, nor upon a twenty years' possession; but upon the use of the land with the assent of the owner for such a length of time that public accommodation and private rights might be materially affected by the interruption of the enjoyment. The issue is therefore a mixed question of law and facts, to be found by the jury under the direction of the court, upon the consideration of all the circumstances. The length of time of the enjoyment furnishes no rule of law on the subject which the court can pronounce without the aid of a jury, unless it amounts to twenty years; but it is a fact for the jury to consider, as tending to prove an actual dedication, and an acceptance by the public. Hence a jury have been sustained in finding a dedication after four or five years of enjoyment. In another great case, which was much contested, six years were held sufficient; and in another it has been held that after the use of a way five years without prohibition, or any visible sign that the owner intended to preserve his right, the public title was complete. It is a question of intention, and therefore may be proved or disproved by the acts of the owner and the circumstances under which the use has been permitted.(192) And our supreme court, in the case of Hays vs. The State, say: "However this may be, the evidence offered by the State was sufficient to secure the finding. Whatever may have been the condition of other parts of the road, a space passing through the defendants's land had been used as a highway for fifteen years. This he obstructed by building a fence across it.

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(192) 2 Greenleaf on Evidence, sec. 662.

The use thus proved was at common law sufficient evidence of dedication or grant. The appellant insists that if a highway can be established by less than twenty years' use, it will render superfluous and unnecessary a provision of the statute which declares that all public highways which have been used, or may hereafter be used as such, for twenty years or more, shall be deemed public highways. We think otherwise. Twenty years' use this statute makes an absolute bar; but Mr. Greenleaf says (and we think the authorities sustain him) that "the right of the public does not rest upon a grant by deed, nor on twenty years' possession, but upon the use of the land with the assent of the owner for such a length of time that the public accommodation and private right might be materially affected by the interruption of the enjoyment."(192) And in the case of The State vs. Hill the same court says, that in the case of Hays vs. The State, it was held that the statute, though it makes twenty years' use an absolute bar, does not impair the right of the public to insist upon a dedication in accordance with the common law rule; and under that rule it has been decided that the unopposed use of the highway by the public, over the land of an individual who is cognizant of the fact, for a much less period than twenty years—say four or five years—was sufficient to raise the presumption of dedication. Indeed, the weight of authority seems to be that the use of the land for a highway for such a length of time that public accommodation and private right might be materially affected by an interruption of the enjoyment, would be evidence that the owner intended a dedication to the public.(193) And in the case of Holcraft vs. King and others, the same court held—"Public highways may be established in this State, first by order of the board of commissioners of the county; secondly, by express grant; thirdly, by a dedication arising by presumption from a continued use of the place for a considerable period of time by the public, as a public highway, with a knowledge thereof by the owner, and without objection on

(192) 8 Ind. 425. (193) 10 Ind. 219.

his part; and in this case the finding of the court shows that the way obstructed by the plaintiff had been opened, worked and used by the public as a public highway, for a continued period of fifteen or sixteen years, of which the plaintiff had full knowledge, if not for the whole period for at least eight or ten years, and that during all the latter period he also knew it was not on the section line. With a knowledge of these facts he not only did not object, but on the contrary, some four or five years prior to the time of the alleged trespass, voluntarily opened an extention thereof thirteen rods, so as to connect the Newcastle road, and thus invited the public to use it as a public highway, and it was accordingly so used and worked. These facts, we think, raise a clear legal presumption of dedication by the plaintiff of the ground occupied by the road as a public highway. Nor can the fact that the plaintiff opened a way on the section line for the use of the public affect the question. A public highway, however established, cannot be altered or changed at the will of the land owner.(194)

The court of appeals of the State of New York, in the case of Denning vs. Roome, in commenting upon this question, says, "The evidence shows that an uninterrupted enjoyment of this part of the street was had by the public for nineteen years. Did this occupation debar the plaintiff from all rights to take possession of the premises in question? It has not been determined what length of time individual property must be used as a public way to create a presumption of a dedication of it to the public; and the reason why no precise time has been fixed, probably is that the presumtion does not depend alone upon the length of time the use continues; other circumstances are to be brought into consideration which may extend or contract the period at which the presumption attaches. It is said by a late writer on presumptive evidence, that when the intention is plainly and significantly shown from the onset, submission to the public use for six or eight years, or possibly even for a less period, would exclude the owner

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(194) 25 Ind. 352; 7 Ind. 706.

of the soil from reasserting his ancient rights. Whether the right in the public attaches after five or six years or not till the expiration of twenty, depends upon the circumstances of each particular case.(195)

It was a contested question in the Kingdom of England for years whether a *cul-de-sac* could become a public highway by use. The supreme court of the State of New York, in the case of Holden vs. The Trustees of Coldspring, held that a road which was attempted to be established in that case by proof of dedication by the owners of the land, and accepted by the public authorities, came to an end at one terminus upon the private grounds of an individual, while at the other end it connected with the public street in the village of Coldspring, that it was not a highway;(196) and our supreme court, in the case of The State vs. Frazer and another, in commenting upon the case of Holden vs. Trustees of Coldspring, where the question was raised upon the following instruction, which was asked by the defendant, and which was given to the jury and excepted by the State: "Neither the intention to dedicate land to the public for the purpose of street, or public road, nor the use thereof by the public in that manner, can make it a highway in that which will not answer the settled definition of a highway. Therefore a way which communicates only at one end, being closed up at the other, is not susceptible of dedication to public use as a highway." The court says upon these instructions, "that it may be that the first and foregoing instruction would be bad law applied to some state of facts, but in the absence of the testimony we are bound to presume in favor of the action of the court below. We think that there might be a case where this instruction might not be erroneous without deciding on the rule recognized in Holden vs. Trustee of the village of Coldspring. * * as an abstract proposition of law of universal application, we think in the case under consideration, as the record now stands, the court committed no error in giving the instruction."(198)

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(195) 6 Wendle, p. 652. (196) 23 Barb. 103. (198) 28 Ind. 196.

In the case of Bateman v. Black, the action was trespass. It come before the Court of Queen's Bench in 1852. The defendant had entered upon the plaintiff's land and pulled down a wall that the plaintiff had erected across the supposed highway. The defendant pleaded that the *locus in quo* was a public and common highway for all the Queen's subjects to go and return, &c. The plaintiff denied this and thus the issues were formed. It appeared that the *locus in quo* was a passage leading from the public street up to a court of which the plaintiff was the owner, and which consisted of fourteen or fifteen houses, but there was no thoroughfare through the court. The defendant had a house abutting on the street into which a doorway had been opened by him. The plaintiff required the defendant to block up this door, which he refused to do, and consequently the plaintiff directed a wall to be built in the court so as to block up the defendant's doorway. This wall the defendant knocked down while it was being erected, which was the trespass complained of. The passage had been paved and lighted by the local authorities. Lord Campbell directed the jury to find a verdict for the defendant. On showing cause, the plaintiff's counsel admitted that the point that it could not be a highway because there was no thoroughfare had never been decided, but he referred to various dicta of judges on that side of the question. It was urged on the other side that it was a mere *cul de sac*, and not a thoroughfare, and that hence it could not be a highway. The opinion of Lord Campbell on this point was that "we must take it that there is a good finding on this issue unless there can not in point of law be a good highway where there is no thoroughfare." No such a position can, I think, be supported. There may be or there may not be a highway under such circumstances. It would be very strong to hold that there could be no highway even where there had been an expressed dedication to a public purpose because the place is no thoroughfare. There may be a large square with only one entrance to it, and if the owner allows the public to use it without restriction for a great many years, he can not afterwards turn around and say they were

all trespassers. That would be, as said by Lord Kenyon, a trap to catch trespassers.

Judge Denio, in delivering the decision of the Court of Appeals of the State of New York, in the case of The People ex rel. Williams v. Kingman, after citing many English authorities, says Lord Kenyon laid it down that there might be a public highway where there was a *cul de sac*, and that it was a question for a jury on the evidence whether such a place was a highway or not. I do not find that this case has been expressly overruled. In other cases referred to the judges do not hold that such a highway does not exist, but only say there is no evidence of there being a highway. It seems to me to rest on principles of convenience, that there may be a highway without a thoroughfare, and it is not inconsistent with what is laid down by Hawkins and other text writers on the subject. The jury having here found that there was a highway, the fourth plea (which sets up the existence of a highway) is made out, and being unobjectionable in point of law, the defendant is entitled to a judgment upon it. * * * After this well considered case, I take it that no question can now be entertained upon the point at Westminster Hall.

If we were now free to lay down a rule upon the subject, as perhaps we are, the modern English cases not being authority with us, I should say that the principle that has been thus established in England would be a more convenient and reasonable one. Highways and streets having no issue at one extremity are quite common, and, indeed, indispensable in many parts of the country. Take the case of a road leading into the northern wilderness of this State. They extend as far as the country is settled where they stop and remain in that condition until the progress of the settlement warrants their further extension. If it were held that they could not be laid out unless they should run quite across the mountain to the north slope, it would be impossible that it should ever be established. The same remark is true of roads laid out in newly settled portions of the State bordering upon the original forests. The roads are projected into the wilderness as far as it is necessary or

practicable at the time to make them, and afterwards they are extended from time to time as circumstances may require. For similar reasons in many of the cities and villages there are short streets leading to ravines and to cliffs whence there can be no outlet and where they must necessarily stop, and yet the owners of dwellings situated upon these find them quite indispensable to the enjoyment of their property, and they would be greatly surprised to be told that they were not legal streets. The same thing is true of streets running to unnavigable waters, or to points on the sea shore where there can not be a harbor or landing place.

Without spending more time upon these illustrations, I feel satisfied that the point insisted on, on behalf of the commissioners of highways, can not be maintained. If it was supposed to be the law in England, it was on account of certain peculiarities which have only a limited application here. Nearly all the highways in England are such by prescription, dedication or use, and where the way is used by only a limited number of persons the question will often arise whether it is a public highway or a private passage. This question, to be determined by a jury and the facts that the way is or is not a thoroughfare, has a very strong bearing upon the issue. It was this that caused Mr. Justice Crompton to make the remark that it was always a strong observation to the jury that the way leads nowhere.(197)

Mr. Bishop, in his excellent work on criminal laws, in commenting upon the question whether a road that was open to the public at one end and closed at the other could become a highway or not, says: "There is a question whether a *cul de sac*, as it is called, or a way which terminates in no other way, and ends on private property, is to be deemed a highway in such a sense as to make the obstruction of it indictable. Some opinions have been expressed to the effect that since the public can have no occasion to use it, there can not be the evil resulting to the public from its obstruction which the law requires. But on

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(197) 24 New York, 559.

principles, why may not the public reserve to itself the use of such a way as some times it does the use of a square, so as to render its obstruction punishable in the same manner.(198) From all the authorities we have been able to collect and examine upon this question, we have arrived at the conclusion that a *cul de sac*, or a road open at one end and closed at the other, may become a public highway, 1st, by expressed grant; 2d, by dedication arising by presumption from a continued use for a considerable time with a knowledge of the owner and without objection on his part. 3d, by order of the Board of Commissioners. And the mere fact that it runs no where or intersects with no other highway, is a circumstance that may be given to the jury for the purpose of dispelling the idea of the claims of the public to the road as a highway.

It is provided by section 39 of the act for the establishment, location, vacation and change of public highways, that "no county road shall be less than thirty feet wide, and no township road shall be less than twenty-five feet wide." * * But this provision does not apply to roads established by express grant, nor by dedication, from the use of the highway. If the public use the ground of an individual for such a length of time as to create a presumption of dedication, the width of the road as traveled by the public will be the width of the highway.(199) The ground upon which the right of the public rests, to take by user the possession of an individual's property and hold it as a public highway is on that of *estoppel in pais*. After an individual has suffered the public to use his land as a highway for such a length of time that public accommodation and private rights might be materially affected by the interruption of the enjoyment, would be sufficient to estop the owner from re-asserting his former claim. The law requires every man to be active in asserting his rights under such circumstances. And if an individual sleeps upon his

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(198) 2 Bishop's Criminal Law, p. 1236, sec. 1236; Commonwealth vs. Tucker, 2 Pickering, 44. (199) Hart v. Trustees of Bloomington Township, &c., 15 Ind. 226; Banard and others v. Haworth, 9 Ind. 193; Epler v. Nimon, 5 Ind. 459; Debolt v. Carter and another, 31 Ind. 355.

rights for years, or for such a length of time that others will be discommoded by his acts, he will be prohibited or precluded to set up a claim paramount to the one the public has acquired over his land while he was laying idly by and neglecting to assert his title.(200)

Having discussed the first and second methods of establishing highways at considerable length, we will now notice the third and last method. Our statute is as follows:

Roads running in but one county, and through more than one township.

SEC. 15. Whenever twelve freeholders of the county, six of whom shall reside in the immediate neighborhood of the highway proposed to be located, vacated, or the change to be made shall petition the Board of County Commissioners of the county in which such highway is situated, setting forth in such petition the beginning, course and termination of the highway proposed to be located or vacated, or of the change proposed to be made, together with the names of the owners, occupants or agents of the lands through which the same may pass, such board, if they shall be satisfied that such notice of such application has been given by publication three weeks successively in a newspaper published in the county, or by posting up notice in three of the most public places in the neighborhood of such highway, or change, at least twenty days before the meeting of the board at which such petition is to be presented, said board shall appoint three persons to view such highway.

SEC. 16. The auditor of such county shall issue a precept to the sheriff thereof, commanding him to notify such viewers of the time, place and object of their meeting, and such viewers, at such time and place, after having taken an oath, before some officer authorized to administer oaths to faithfully perform their duties, shall proceed to view the highway, or such change; and if they shall deem the highway to be located, or the change to be made, of public utility, they shall lay out and mark the same on the best ground,

(200) Haynes and another v. Thomas, 7 Ind. 38.

not running through any person's enclosure of one year's standing, without the owner's consent, unless upon examination a good way can not otherwise be had: *Provided*, That where the road is laid out upon the line dividing the land of two individuals, each shall give half the road.

SEC. 17. Such viewers, or a majority of them, shall make a report of their proceedings at the ensuing session of the Board of Commissioners of the county in which such location, change, or vacation may be made, giving a full description of such location, change or vacation, by routes and bounds, and by its course and distance, except that in case of the vacation of a road, or any part thereof, such description only as will designate it clearly, shall be required; and in such case, a copy of the order vacating such highway shall be transmitted by the proper auditor to the trustees of the townships in which such vacated highway is situate, who shall cause the supervisors thereof to be notified accordingly.

SEC. 18. If no objection be made to such proposed highway, vacation or change, such board shall cause a record thereof to be made, and shall order the same to be opened and kept in repair, which order shall be transmitted to the trustees of the townships in which such location or change is made; and such trustees shall cause a copy of such order to be entered at length on their record book, and notice thereof to be given to the proper supervisor to work such location or change.

SEC. 19. If any person through whose land such highway or change may pass, shall feel aggrieved thereby, such person may at any time before final action of the board thereon, set forth such grievances by way of remonstrance, and the said board shall thereupon appoint three disinterested freeholders as reviewers, and assign a day and place for them to meet.

SEC. 20. Such reviewers, having five days' notice, to be given by the party remonstrating, shall meet at the time and place designated, and take an oath faithfully to discharge the duties assigned them, and shall then or on any other day, to which a majority may adjourn, prior to the

next session of such board, proceed to review the proposed highway and assess the damages, if any, which such objector may sustain from such highway or change being opened, vacated or continued through his lands, and shall report the same to the ensuing session of such board.

SEC. 21. If a majority of the viewers assess and report damages in favor of the objector, and the board shall consider the proposed highway, vacation or change, to be of sufficient importance to the public, they shall order the costs and damages to be paid out of the county treasury; but if a majority report against the claim for damages, the objector shall pay the costs; and when payment of damages is made as herein provided, such highway shall be recorded and ordered to be opened and kept in repair, as hereinbefore provided, after notice to the proper trustees.

SEC. 22. If it shall be made to appear to the board that the damages assessed are unreasonable, they may set aside such assessment and order another review, under the same regulations as provided in case of the first review.

SEC. 23. If any one or more freeholders residing in such county, along such proposed highway, vacation or change, shall object to the same at any time before final action thereon, as not being of public utility, other viewers may be appointed, who shall proceed, on a day to be by them designated, after having taken an oath faithfully to discharge the duties assigned them, to examine the proposed highway, and shall make report to such board at their next session, whether or not, in their opinion, the said highway, vacation or change, will be of public utility.

SEC. 24. If a majority of the viewers last named report against the public utility of such highway, the same shall not be established, unless they will open and maintain the same at their own expense; but if they report favorable thereto the objector shall pay the cost of the reviewers, and the highway shall be recorded and ordered opened and kept in repair.

SEC. 25. That whenever any person shall procure the establishment of a highway, private or public, by change of one already established on or across his own land, before

the same shall be received by the proper supervisor as such, it shall be made as passable as the old highway, or as nearly so as the nature of the case will admit of, which fact the trustee of the township in which the change is made shall be duly satisfied before such supervisor shall be required to keep it in repair.

SEC. 26. Any person aggrieved by any decision of any Board of Commissioners, may appeal therefrom to the circuit or common pleas court of such county, upon his filing a bond, with surety and penalty, to be approved by the auditor of such county, conditioned for the due prosecution of such appeal, and the payment of costs, if costs be adjudged against him; and in case proceedings shall be had in more than one county, the auditors of each county, on being notified of such appeal by the auditor of the county in which the appeal is taken, shall transmit to the clerk of the court to which the appeal is taken, all the proceedings in such county; and upon the determination of such appeal, such clerk shall notify the auditors of all the counties interested thereof.

General provisions concerning Highways.

SEC. 39. No county road shall be less than thirty feet wide, and no township road shall be less than twenty-five feet wide; and the order for laying out of any highway shall specify the width thereof.

SEC. 40. Public highways established on a county or township line, shall be opened and repaired by the supervisors of the proper road districts on each side thereof, and by the joint labor of the hands in each of such districts in each county or township.

SEC. 41. Whenever any public highway shall have been laid out through any inclosed land, the supervisor shall give the occupant of such land, or the owner, if a resident of the road district, sixty days' notice in writing, to remove his fence; but such owner or occupant shall not be compelled to move such fence between the first day of April and the first day of November; and if such fence is not removed pursuant to such notice, such supervisor shall cause the same to be done.

SEC. 42. If the owner or occupant shall not have been allowed damages for the laying out of such highway upon his land, the supervisor shall give the person removing such fence credit on the highway tax for any amount that the supervisor shall deem just.

SEC. 43. Every public highway already laid out, or which may hereafter be laid out, and which shall not be opened and used within six years from the time of its being so laid out, shall cease to be a highway for any purpose whatever; but if any distinct part thereof shall have been opened and used within six years, such part shall not be affected by the provisions of this section, nor shall this section be applied to streets and alleys in any town: *Provided, however*, That the trustees shall decide that public necessity does not require such road kept open, which decision shall be recorded by the clerk, whereupon said vacated highway shall vest in the rightful owner who may have the title thereof according to law, of the property on each side of said highway.

SEC. 44. In all applications for the location, change, or vacation of any public highway, actual settlers upon any public lands in any county in this State shall have and possess all rights in this act granted to freeholders.

SEC. 45. All public highways which have been or may hereafter be used as such for twenty years or more, shall be deemed public highways, and the Board of County Commissioners shall have power to cause such of the roads used as highways as shall have been laid out but not sufficiently described, and such as have been used for twenty years but not recorded, to be ascertained, described, and entered of record.

SEC. 46. No person owning lands, or who is related by consanguinity to any person owning lands, along any proposed highway or change, shall be competent to act as commissioner, viewer, or reviewer thereof.

SEC. 47. Viewers and reviewers appointed under this act shall receive one dollar for every day they shall be necessarily employed as such.

SEC. 48. The township board of any township, on petition of an individual desiring to plant a hedge on his land

adjoining a public highway, may grant such individual the privilege of placing his fence seven feet on such highway: *Provided*, Said fence will not be an obstruction to the highway.

SEC. 49. Any person may have a private road laid out, changed, or vacated, upon presenting a petition to the trustees of the township in which such petitioner may reside, under regulations hereinbefore provided for roads running through one township only. If such private road shall extend into more than one township, such petition shall be presented to the county board, under the same regulations, as is provided in case of highways running into more than one township: *Provided*, That such board, or trustees, may order such private road to be laid out, changed, or vacated, without any view, if there be no remonstrance against such petition; shall open and keep in repair such road at his own expense: *And provided further*, That such road may be either dirt, plank, Macadamized, gravel or railroad.

To establish a road or public highway under the above provisions, the first step to be taken is to get up your petition, and as this is the starting point and basis for the entire action, great care should be used by the draftsman to get the petition drawn up in accordance with the law.

Practice in Highway cases under the Statute.

It will be seen by the reading of these sections, that there is no statute of our State so ambiguous and hard to understand as that relating to highways. And the attorney who attempts to practice before the board of commissioners under this statute, will be compelled to grope his way through darkness, without a precedent or example to guide him. Our supreme court has attempted in its wisdom to throw some rays of light upon the highway act, and to mark out a course which would, as they supposed, ultimately lead into a settled practice in such cases. But so far they have only succeeded in adding to its complications. It is provided by the ninth section of the act creating the board of commissioners, "that such commissioners shall adopt regulations for the transaction of business,

and in the trial of causes they shall comply, so far as practicable, with the rules of conducting business in the circuit court. And in the case of Little vs. Thompson and others, our supreme court held that section fifty-four of the practice act, which reads as follows: "That if no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court over the subject of the action, and except the objection that the complaint does not state facts sufficient to constitute a cause of action,"(*a*) was applicable to the practice before the board. (*d*) As this section clearly authorizes the filing of a demurrer for defects of parties, one would readily have concluded that as section nine of the commissioners' act provides that in trials before the commissioners they must be governed by the practice in the circuit court, that the only way that an objection could be waived to pleading before the commissioners, would be by demurrer. But in the case of Logan vs. Kiser and others, the same court held that no such pleading as a demurrer or answer is allowable in such cases.(*b*) And in the case of Hays and others vs. Campbell and others, the same court held that unless the petition set out the names of the land owners over which the road would pass, that the commissioners had no authority to act, and had no jurisdiction, and that a motion to dismiss the proceeding for this reason could be made and entertained at any stage of the proceeding.(d) But in the case of Crossley and others vs. O'Biney and others, the same court held that a motion to dismiss the proceeding because the petition failed to set out the names of all the land owners over which the highway would pass, could not be made after the appointment of viewers.(*e*) But in the case of Hughs vs. Sellers and others, the same court reaffirmed the decision in the case of Hays and others vs. Campbell and others, and held that a motion to dismiss should be entertained by the court at any time before final action, if the petition failed to set out the names of

(*a*) 2 G. & H. p. 81, s. 54. (*d*) 24 Ind. 146.; 1 G. & H. p. 249. (*b*) 25 Ind. 393. (*d*) 17 Ind. 430. (*e*) 24 Ind. 325.

the land owners over whose land the highway passed.(*f*) From these decisions we arrive at the following conclusion: That if there is any defect not apparent on the face of papers or petition, it must be taken advantage of at the time of the presentation of the petition, or before the viewers are appointed, or else they are waived. Any defects in the notice or time of publication, or that the petition was not signed by a sufficient number of freeholders residents of the county and in the neighborhood of the highway, or that petitioners were not adults, or *compos mentis*, must all be raised before the appointment of reviewers.(*g*) But if there is a defect apparent on the face of the petition, that can be objected to at any stage of the proceedings.(*h*) These decisions are evidently based upon section 54 of the practice act *supra*. If you desire then to take advantage of any defects that are not apparent on the face of the papers, you must appear before the board at the time of the presentation of the petition to the board and make your objection, otherwise you will be barred. And the exact mode of raising objections not apparent on the face of the petition, is not well settled. Our supreme court, in the case of Little vs. Thompson and others, speaking in regard to a motion made by the defendant to dismiss the petition because there were not twelve freeholders on the petition, say, "We do not think the court erred in overuling the motion. The objection goes to the capacity of one of the petitioners to join in the petition, and as the objection did not appear on the petition, if it could have been presented at any time after the appointment of viewers, it should have been raised by plea in abatement, and not by motion."(*g*) Objections that go to the capacity of the petitioner must be raised by plea in abatement. And an objection that goes to the defect of notice must be raised by motion to dismiss the proceeding, or motion to set the service or notice, aside. If the defect that you wish to object to relates to the qualification of the petition-

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(*f*) 54 Ind. 337. (*g*) 24 Ind. 146; *id.* 325; 29 Ind. 354. (*h*) 34 Ind. 337. (*g*) 25 Ind. 393.

ers, or any one of them, you must appear before the board and file your plea in abatement.

Form for plea in abatement:

JOHN SMITH
vs.
HUGH COOK and others. } Petition for Highway.

The defendant John Smith pleads in abatement to the petition herein, that William Hunt, one of the petitioners to said petition, was not at the time he signed said petition, nor is not at this time, a resident freeholder of Vermillion county, Indiana; wherefore the defendant prays that because the said William Hunt was not at the time of the signing of said petition, nor is not at this time a resident freeholder of the aforesaid county, that said petition may abate.(*h*)

JOHN SMITH.

Subscribed and sworn to before me, this — day of ——, 187—. JOHN SHORT, Auditor.

All defects apparent on the face of the petition can be taken advantage of by oral motion, or you can reduce your motion to writing. If your plea in abatement is sustained, or if your motion to dismiss the proceeding is decided in your favor, this will put an end to the proceedings at once. But the petitioners may at any time recommence their proceeding again. But if your plea and motions be overruled, you can then remonstrate.(*h*)

The first thing to be done by an individual who wishes to establish, locate or change a public highway, is to get up his petition and ascertain whether the public or the citizens living in the neighborhood of the proposed highway desire to join with him in his public enterprise. And as the petition, in the getting up and locating of a public highway, is the basis upon which the whole proceeding must ultimately stand or fall, great care should be taken in getting it correct and accurate. The requirement of the law must

(*h*) All pleas in abatement must be verified by affidavit. 28 Ind., 521; 25 Ind., 112; 20 Ind., 528.

be substantially complied with. No petition will be sufficient which does not set out the beginning, course and termination of the highway proposed to be located or changed, and the names of the owners, occupants or agents of the land through which the highway passes. Under the act of 1867 the evident intention of the Legislature was to require the names of the land owners to be set out, and provided the name of the owner was unknown, then the name of the person occupying the same should be given. If the name of the owner can not be ascertained, and no person occupies the premises, if there is a person living in this State, or even if he lives out of the State, who has control and management of the farm, he should be named in the petition as the agent having control and management of the premises, (the name of the owner being unknown.) If the names of the owners of the land are set out in the petition, this will be sufficient, as the law presumes every man occupies and superintends his own premises.(*d*) There must be a prayer in the petition; it must pray for something, or ask that something be done. If you want to locate, say locate and establish a public highway. If you want to relocate, let the prayer of your petition be to relocate the following public highway. If you want to change, let the prayer of your petition be for a change or relocation and location. Your petition must show that the road runs in the county in which you make your application. It is not necessary for you to allege that the subscribers are all freeholders; this will be a question of proof on the presentation of your petition. You need not allege in your petition that six of the petitioners reside in the immediate neighborhood of the highway proposed to be located, relocated or changed.(12) The law is silent as to what other qualification the petitioner shall have, except that he must be the owner of real estate. But we are inclined to the opinion that the law contemplates more than this. The word petition in the highway act means an exercise of an intelligent power, an act of thought; and a petitioner should have a

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(*d*) Mulhollen v. Thomas, 7 Ind., 165. (112) Bowen v. McCord, 20 Ind., 270.

clear comprehension of the evil that is intended to be remedied, and the want of the community in which he lives, or through which the road or highway is to pass. We think that the law, when it says a "petition signed by twelve freeholders, six of whom shall reside in the immediate neighborhood," means twelve adult persons who are capable of knowing and understanding what they are about. The law makers never intended that roads that take men's property from them and appropriate it to the community, should be established on a petition presented to the commissioners by children or *non compos mentis*, distracted or idiotic persons, yet they all can be freeholders under our law. The right of eminent domain, or the paramount right that the public have to take one's property from him for the use of the public should only be exercised in clear cases where the wants of the community are imminent. And as the board of commissioners must act solely upon the evidence and representations of others, they should inquire into the capacity and means that their petitioners have of informing themselves as to the wants of the community; and if, on inquiry, they find that the petitioners are all adult persons, and *compos mentis*, the inquiry should there stop. And perhaps as the law presumes every man sane until the contrary is established, the board need not make any inquiry into the mental condition of the signers, but this can be established on the defense. We have therefore come to the conclusion that no highway can be established in this State on the petition of infants, persons of unsound mind, or of *feme coverts*. But perhaps in cases of a *feme covert* or married woman, she might be a valid petitioner by the consent of her husband, and this consent may be in writing or given orally. But if the fact that one of the petitioners, whose name is appended to the petition, is established that she is a *feme covert*, unless there are twelve other persons freeholders, on the petition, the board would have no jurisdiction of the cases, unless the fact was established that her husband had consented to

(12) Bowen v. McCord, 20 Ind., 270.

the same. If her husband joins with her in the petition, we think that this would be sufficient.

The petition may be in the following form:

To the Honorable Board of Commissioners of Vermillion Co.:

The undersigned, freeholders and residents of said county, would pray your honors to locate and establish a public highway in Vermillion county, Indiana, on the following route: Commencing at northeast corner of section 18, township 17 north, range 9 west, running thence due east one mile to the northeast corner of section 17, township and range as aforesaid, thence due north one mile to the northeast corner of section 8, township and range aforesaid; then to intersect the Wabash and Grand Prairie road. The proposed highway passes over the land of John Smith, Thomas Hays, Jesse. Mendenhall and Thos. Swim. We would recommend that said road be sixty feet wide, as it will probably be extensively traveled. And we will ever pray.

Hugh Cook,	William Hunt,
Joseph Clark,	John Doe,
James Sikes,	Henry Bundly,
Phil. Harrier,	John Cross,
Henry Axton,	Hugh Johnson,
Robert Turner,	George W. Miller.

The above form can be varied to suit any route.

As it would be an act of injustice to take a man's property from him for the use of the public without giving him a chance to come in and object and show his damages, the law, therefore, provides that the petitioners must, before they can get their road located, give notice, either by three weeks' publication successively in some newspaper published in the county where the road is to be established, or by posting up three written notices in three of the most public places in the neighborhood of the road proposed to be located, vacated or changed, to be made of the time the petition will be presented.(3) The law does not specify what the notice shall contain, but we think it ought to be sufficiently specific to notify the public that there will be a petition presented to the board of commissioners at a cer-

tain time to be named, praying for the location, &c., of a highway on a certain route, and that it will pass over the lands of certain persons, the names of which should be set out. The notices need not be signed by any one.(*a*) The fact of publication and of the posting up of the notices can be established by affidavit.

Form of notice:

NOTICE.

Notice is hereby given that there will be a petition presented to the Board of Commissioners of Vermillion county, Indiana, at their December session, A. D., 1872, praying for the location and establishment of a public highway on the following route in said county: Commencing at the north-east corner of section 18, township 17 north, range 9 west, running thence due east one mile to the north-east corner of section 17, township and range aforesaid, thence due north one mile to the north-east corner of section 8, township and range aforesaid, then to intersect the Wabash and Grand Prairie Road. Said proposed highway will pass over the lands of John Smith, Thomas Hays, Jesse Mendenhall and Thomas Swim. WILLIAM HUNT.

The above form may also be used in case of publication in a paper.

At the time you present your petition to the board you must make proof of publication either by posting up notice or insertion in a paper; and in case you have given notice by posting up notice, you can make proof of this either by oral evidence or by affidavit. If you make proof of the fact by a witness you must have him before the commissioners at the time and place you present your petition, have the auditor to swear him to well and truly answer such interrogatories as may be propounded to him, then have him to state the fact as to the time and places he put up the notices.

If you wish to make proof by affidavit, the following form may be used:

(3) 1 Res. by G. & H., p. 362. (*a*) Wright v. Wells and others, 29 Ind., 364.

STATE OF INDIANA, }
Vermillion County. } ss:

Thomas Smith, being duly sworn, upon his oath says that he stuck up on the 1st day of December, 1872, three notices in Vermillion county, Indiana, of which the above and foregoing is a true copy; that said notices were stuck up one in the town of Eugene, one at White's Mill, and one at the town of Newport; that these three places are the most public places in the neighborhood of the proposed highway mentioned in said notices.

THOMAS SMITH.

Subscribed and sworn to before me this December 21st, 1872. JOHN SHORT, Auditor.

If you give notice by publication in a paper you must get the affidavit of the printer. The following form may be used:

STATE OF INDIANA, }
Vermillion County. } ss:

Personally appeared before the undersigned, Samuel B. Davis, publisher of Hoosier State, a newspaper of general circulation printed and published in Vermillion county, Indiana, who, being duly sworn upon his oath, saith that the notice, of which the attached is a true copy, was duly published in said paper for three weeks successively, the first of which publications was on the 10th day of November, 1872, and the last on the 1st day of December, 1872.

S. B. D.

Subscribed and sworn to before me this 10th day of December, 1872. JOHN SHORT, Auditor.

Most all the forms that I have given in this work have had the name of the county inserted, but the reader will see at once that this can be changed to suit the circumstances.

At the time you present your petition to the board, after making proof of publication or notice, you must then estab-

lish the following facts by the testimony of some competent witness:

1. That the petition is signed by twelve freeholders of the county. 2. That six of the petitioners now live in the immediate neighborhood of the proposed highway.

For if you fail to do this the board will have no jurisdiction of the cause, and if they act in the premises their acts will be void.(10)

After these facts have been established the board must, if there is no remonstrance filed, appoint "three persons to view such highway." The statute provides that no person owning land, or who is related by consanguinity to any person owning land along any proposed highway or change, shall be competent to act as commissioner, viewer, or reviewer thereof.(11)

The word consanguinity means relation by blood; hence no person who owns land along any proposed highway, or any person who is related to any one in the degree of second cousins, is competent(12) to act as viewer.

As litigation means a dispute between different parties in a court of justice for the purpose of enforcing the right, and as each party is always presumed to present his claim in the honest belief that it is meritorious and just, the court should give each litigant a fair, impartial hearing. It is always presumed that a tribunal that sits as a dispenser of justice between man and man is unbiased and without prejudice. One of the greatest reasons of men's inability to agree upon financial matters and matters in reference to property, is selfishness and prejudice. The board should, therefore, in selecting men for viewers, be careful to get impartial and disinterested persons. The board should make a record of all its proceedings in the premises.

Form for Record:

Comes now William Hunt and presents a petition signed by twelve freeholders of Vermillion county, Indiana, praying for the location of a public highway in the aforesaid

(10) Little vs. Thompson and others, 24 Ind. 146; Hays et al. vs. Campbell et. al., 17 Ind. 430. (11) 1 Res. by G. & H., p. 366, sec. 46. (12) Brady vs. Richardson, 18 Ind.; 12 Ind. 303.

county on the following route: Commencing at the north-east corner of section 18, township 17 north, range 9 west, running thence due east one mile to the north-east corner of section 17, township and range as aforesaid; thence north one mile to the north-east corner of section 8, township and range above mentioned.

And it appearing to the satisfaction of the board that notices of the time of the presentation of this petition has been given by posting up notices in three of the most public places in the neighborhood of the road; and it further appearing to the board, from the evidence adduced, that all the signers are freeholders of said county of Vermillion, and that six of them reside in the immediate neighborhood of the aforesaid road, it is therefore ordered by the board that Henry Tate, Clark Smith and Richard Roe be, and they are hereby, appointed viewers to view the proposed highway aforesaid, and to report as to whether the same is of public utility at the next term of this court, and this cause is continued. And that they meet for to view said road on the 31st day of January next at the south-east corner of section 18, set out above.

S,
R,
B,} *Commissioners.*

After the board has appointed viewers it is the duty of the auditor of such county to issue his precept to the sheriff thereof commanding him to notify such viewers of the time, place and object of their meeting. The law fixes no particular time when this shall be done, but it should be done in a reasonable time; the viewers should have ample time to meet and take the necessary oath and view the route and travel to the county seat and make their report. The precept of the auditor may be in the following form:

STATE OF INDIANA,
Vermillion County. } ss:

To the Sheriff of Vermillion County:

You are commanded to notify Henry Tate, Clark Smith and Richard Roe that they were appointed viewers to view

and report whether a highway located in Vermillion county, Indiana, on the following route would be of public utility: Commencing at the north-east corner of section 18, township 17, range 9 west, running thence east one mile to the north-east corner of section 17, township and range aforesaid; thence due north one mile to the north-east corner of section 8, township and range aforesaid. That they will first take an oath as required by law, and then meet at the north-east corner of the aforesaid section 18 on the 31st day of January next; that you then and there view said route, and if you are of the opinion that a public highway located on said route would be of public utility, you will lay out and make the same on the best ground not running through any person's inclosure of one year's standing without the owner's consent, unless upon examination a good way can not otherwise be had, and make report of your proceedings in the premises at the next term of the board. In witness whereof I have hereunto set my hand and official seal this December 29th, 1872.

[SEAL.] JOHN SHORT, Auditor.

The sheriff, on receipt of the precept, must proceed at once to serve the same on the parties; this he can do either by reading or leaving a copy at their last place of residence. We think the better way would be to leave a certified copy, as this would be a guide for the viewers to follow. But the viewers should in no case attempt to view and locate a road without a description of the route which they are to view. After they have been notified the viewers must meet, at the time and place designated in the notice, and must then and there take an oath faithfully to discharge the duties assigned them; this they can do before the clerk of the court, auditor of the county, a justice of the peace, or notary public residing in their county.

The oath may be in the following form.

We do solemnly swear that we will faithfully discharge our duties assigned us as viewers of the following proposed public highway, commencing at the north-east corner of

section 18, township 17 north, range 9 west, running thence east one mile to the north-east corner of section 17, township and range aforesaid; thence due north one mile to the north-east corner of section 8, township and range aforesaid. So help us God.

HENRY TATE.
CLARK SMITH.
RICHARD ROE.

Subscribed and sworn to before me, this 31st day of January, 1873.

JOHN SHORT,
Auditor Vermillion Co.

After the viewers have once met and taken the necessary oath, they can adjourn to a day in the future, to be by them designated. And no doubt but on meeting the second time they might for good reason adjourn again, to meet at some time in the future. But they must, prior to the next meeting of their county board, meet and view the proposed highway, and if they deem it of public utility, they must lay cut and mark the same on the best ground, not running through any person's enclosure of one year's standing, without the owner's consent, unless, upon examination, a good way cannot otherwise be had. In arriving at the question of utility, the viewers should take into consideration the question of cost: Will it cost the public more than it will be worth? Will the expense exceed the profits? If after a careful examination, the viewers are of the opinion that the expense will be more of a burthen to the community than the road will be of advantage, they should report against the utility of the highway.(13) In coming to a conclusion as to the utility of the road, the viewers should not be confined entirely to the wants of any particular community, but should take a more extended view, and grasp in the wants of the whole community in general.

In laying out said highway, the viewers cannot deviate any considerable distance from the path marked out by the

(13) Crossley and others vs. O'Brien and others, 24 Ind. 325.

petition. That statute that requires them to locate it on the best ground, ought not to be considered as authorizing them essentially to depart from the definite route petitioned for.(14) At the next term of the court they must make their report in writing to the board of commissioners, and in that report, they must either report in favor of, or against the utility of the highway, and their report must not depend on a contingency but must be absolute, either in favor or against the road. The report of the majority will be sufficient.

The following form may be used:

To the Honorable Board of Commissioners of Vermillion County:

We, the undersigned viewers appointed by your honorable body, at your December session, 1872, to view the following proposed highway, situated in Vermillion county, Indiana, commencing at the north-east corner of section 18, township 17, range 9 west, running thence due east one mile, to the north-east corner of section 17, township and range aforesaid, thence north one mile to the north-east corner of section 8, township and range before given, would report to your honorable body that, pursuant to previous notice, we met at the north-east corner of section 18, mentioned above, and after taking the oath before Smith Jones, a Justice of the Peace of said county, we proceeded to view said highway, and to ascertain whether a highway located upon the aforesaid route would be of public utility or not; and after a careful consideration of the wants of the community, and a thorough examination of the proposed route, we came to the conclusion that said proposed highway will be of public utility; we therefore proceeded to lay out and mark the same, which we did in the following manner: The said road was laid out thirty feet wide—fifteen feet on each side of said line—and we drove stakes in the ground at both sides of the same.

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(14) Crossley and others vs. O'Brien and others, 24 Ind. 325.

Having discharged our duty, we now ask to be discharged from our trust. May 1, 1873.

HENRY TATE,
CLARK SMITH,
RICHARD ROE,
} *Viewers.*

At the time the viewers file their report, if there is no remonstrance filed by any one, the report of the viewers should be acted upon at once. The commissioners should confirm the report, and order the road opened. Their proceeding should be entered of record.

The following form may be used:

Comes now Henry Tate, Clark Smith and Richard Roe, viewers appointed at last term of this court to view the following proposed highway, situated in Vermillion county, Indiana, commencing at the north-east corner of section 18, running thence due east one mile to the north-east corner of section 17, same township and range, thence north one mile to the north-east corner of section 8, township and range aforesaid, and file their report in favor of the location and establishment of the proposed highway, which report is received and confirmed, and it appearing to the board that said viewers have in all things discharged their duties well, it is therefore ordered that they be discharged from their said trust. And it is further ordered by the board that said highway be, and is hereby located and established on said route, and that it be thirty feet in width; and that said road shall be opened accordingly and kept in repair; and that the trustees of Eugene township be notified of this fact.

It is provided in section 23 *supra*, That any one or more freeholders who reside in the county, and along any proposed highway, may at any time before final action by the board, object to the location and establishment of the same, as not being of public utility, other men may be appointed by the board, who shall proceed on a day to be designated by the board, to view said proposed highway, and to ascer-

(s) Hughes vs. Sellers *et al.*, 34 Ind. 337.

tain whether the same will be of public utility. They must qualify as other viewers. They must meet at the time and place appointed by the board, and proceed to view said highway, and to ascertain whether the same, if opened, will be of public utility. They must make their report to the board at the next regular meeting. If a majority of these viewers report against the public utility of the highway the board of commissioners cannot establish the same, unless the original petitioners will open and maintain the same at their own expense. The record of the board upon such circumstances should show upon what condition the road is ordered to be opened and kept in repair. If, however, the viewers should report in favor of the utility, they must order the road opened and kept in repair

FORM OF OBJECTION.

To the Honorable Board of Commis'ners of Vermillion County:

We, the undersigned, resident freeholders of the county aforesaid, would represent to your honorable body that we reside along the following proposed public highway in Vermillion county, Indiana: Commencing at the north-east corner of section 18, township 17 north, range 9 west, running thence east one mile to the north-east corner of section 17, township and range aforesaid, thence north one mile to the north-east corner of section 8, township and range aforesaid; being fully satisfied that a highway established upon the aforesaid route will not be of public utility, we remonstrate and object to the establishment of a highway upon the aforesaid route, for the reason that it will not be of public utility.

A. G.
M. D.

File this petition with the auditor, and then prove that you are freeholders residing along the proposed highway. On making this proof it will be the duty of the board to appoint other viewers.

It is provided by section 39 *supra*, that no county road shall be less than thirty feet wide. The board of county commissioners have no authority to establish a public highway less than thirty feet in width, and this must appear in their order, or their proceeding in the premises will be void.

It is provided by section 19 *supra*, that if any person through whose land any highway vacation or change may pass shall feel agrieved, such person may, at any time before final action of the board thereon, set forth such grievances by way of remonstrance. Such board must appoint three disinterested freeholders as viewers, and assign a day and place for them to meet.

The following form may be used:

To the Honorable Board of Commis'ners of Vermillion County:

The undersigned, your petitioner, would represent to your honorable body that he is the owner of the following described tract of land, situated in said county: The north-east quarter of section 17, township 17 north, range 9 west; and that a certain proposed highway petitioned for by Hugh Cooke and others, which is located on the following route through said county, commencing at the north-east corner of section 18, township and range aforesaid, running thence due east one mile to the north-east corner of section 17, township and range as above, thence north to the north-east corner of section 8, township and range aforesaid, passes over and through the above described premises, belonging to your petitioner; that by reason of the location of said highway through my land aforesaid, I will be damaged in the sum of one thousand dollars in this: that I will be compelled to build a fence for at least one-quarter mile; that by reason of the location of said road my farm will become destitute of stock-water, and by this means damage me in my business. I therefore pray your honorable body to appoint viewers to assess my damages in accordance with law, and I will ever pray.

JOHN SMITH.

In order for the board to act on this, you must show by some kind of evidence that you own the land mentioned in your petition. The board will then appoint three disinterested freeholders of the county as viewers, and must assign a day and place for them to meet. The board must make a record of this as well as of all their other proceedings.

The following form may be used:

Comes, now, John Smith, and presents his remonstrance, and says that he is aggrieved by reason of the location of a certain highway running through his land. Said highway is known as the Hugh Cook Road, and runs from the northeast corner of section 18, township 17 north, range 9 west, east one mile to the northeast corner of section 17, township and range aforesaid, thence north one mile to the northeast corner of section 8, township and range as given above. It is therefore ordered by the board that Alva Arrowsmith, William White and John Thomas be and they are appointed viewers, to view and assess the damage, if any the said John Smith may sustain by reason of the location of said highway over his land; that said viewers meet at the northeast corner of section 18, township and range aforesaid, on the 15th day of April, 1873, and that they report their doings in the premises at the next meeting of this board.

_____,
_____,
_____,} *Com'rs.*

The viewers must be notified of their appointment by the remonstrator, and this must be done five days before the time fixed by the board for the viewers to meet.

To Alva Arrowsmith, William White and John Thomas:

GENTLEMEN—You will take notice that the board of commissioners of Vermillion county, at their March session, 1873, on petition by myself, claiming damages by reason of the location of what is known as the Hugh Cook Road across my land. Said road commences at the northeast corner of section 18, township 17 north range 9 west, and

runs thence east one mile to the northeast corner of section 17, township and range as above, thence north one mile to the northeast corner of section 8, township and range as aforesaid, appointed you viewers to view and assess the damages that I may sustain by reason of the location of said road over my land; and the board request me to say that you will meet at the northeast corner of section 18, heretofore mentioned, on the 15th day of April next, at 10 o'clock A. M. JOHN SMITH.

April 1, 1873.

At the time and place appointed for them to meet, the viewers must meet, and after taking an oath to faithfully discharge their duties according to law they can proceed at once to view said road, and assess the damages of the remonstrator, or they may adjourn to meet at some fixed time in the future. In assessing the damage of the remonstrator, the statute fixes no rule for the government of the viewers, but leaves them free to adopt their own course and method of assessing the damages.

Section 21, Article I, of our State Constitution provides that "No man's property shall be taken by law without just compensation; nor, in case of the State, without such compensation first being assessed and tendered."(*a*) The taking of private property for public use is a taking by the State; hence, under this section, the public may take the property of an individual without first tendering the damages. But section 25, *supra*, provides that no highway shall be opened, worked or used until the damages assessed thereof shall be paid or deposited in the county treasury for the use of the claimant, unless the claimant shall consent in writing that the road may be opened.(*g*) But the question as to what the viewers should take into consideration in assessing the damage of an individual over whose land a public highway is located, is a question not free from difficulty. The viewers should take into consideration both the value of the land to be appropriated and the consequential damages, or what might be more properly called the direct and remote

(*a*) 1 G. & H., p. 31. (*g*) Dronberger and others v. Reed, 11 Ind., 420; 1 G. & H., 364.

damages. They should first assess the value of the land, then the necessary expense in removing fences, the number of new rails that will be required, and their value. If the road will divide up the farm into small pieces, or cut off a water-privilege, or is a source of inconvenience to the land owner in any way, these should all be taken into account. They should deduct from the sum total of these damages the amount of benefit the highway will be to the piece of land which it is claimed will be injured. It is thought by some that the benefit arising to the land from the location of the highway, can only be set off against consequential or remote damages. But after a thorough examination of the cases of McIntire v. The State, and the case of the Indiana Central Railroad Company v. Hunter, we are fully satisfied that the benefit may and should be considered in estimating the amount of either direct or consequential damages. But in considering the benefit, the viewers will be confined to the piece of land which is claimed to be injured, and can not estimate the benefit to other lands belonging to the claimant. The true rule upon this question is the one laid down by our Supreme Court in the case of Swidener v. Essex et al., in which they say that the measure of damages in such a case is the difference in the value of the farm with the road and its value without the road.(*h*) After the viewers have assessed the damages, or come to a conclusion upon the case, they must at the next session of the board of commissioners report their verdict or finding to the board in writing.

FORM OF THE REPORT.

To the Board of Commissioners of Vermillion County:

We, the undersigned, appointed by your honorable body at your December session, 1872, to view and assess the damages that John Smith would sustain by the location of the following public highway: Commencing at the northwest corner of section 18, township 17 north, range 9 west, running thence east one mile to the northeast corner of section

(*h*(See, upon this point, 22 Ind., 201; 8 Ind., 74; 11 Ind., 420; 5 Black., 384; 5 Black., 543.

17, township and range aforesaid, thence north one mile to the northeast corner of section 8, township and range aforesaid, through his farm, beg leave to report our proceedings and finding in the premises. After taking the oath required by law, we proceeded to examine the premises, and we found that the aforesaid highway passed over a portion of his land; and, after a thorough examination of all the facts connected with the case, we are of the opinion that John Smith is damaged by reason of the location of said highway over his premises in the sum of fifty dollars. We, therefore, assessed his damages at that amount.

A. A.,
W. W.,
J. T., } *Viewers.*

If the receivers, appointed by the board to assess damages, report in favor of the claimant, it is provided by Sec. 22 *supra*, that if it shall be made to appear to the board that the damages assessed are unreasonable, the board may set aside such assessment and appoint reviewers under the same regulation as provide in case of the first reviewers. The word unreasonable, as used in this section, means more than the words *too high;* it means excessive beyond reason. The word *may*, means shall. Therefore if the board is satisfied that the damages are unreasonable, their duty is imperative, they must set the view aside. But the only way that this question can be raised before the board, is to move to set the report of the viewers aside; this will necessarily raise an issue of facts which the board will have to determine by the weight of preponderance of evidence. Each party in such cases will be allowed to produce and examine witnesses in reference to the point at issue. Under such circumstances, the board should exercise a great deal of caution, and if they believe, after hearing the evidence, that the damages are a little unreasonable, but if the expenses will overrun the profits, they should refuse to set the report aside.

The statute is silent as to the number of times a report of viewers appointed under Sec. 22 may be set aside, but we are inclined to the opinion, from the peculiar wording

of this section, that the board would have no authority to set a second report aside.

If, however, there is no motion to set the report of the viewers aside, or if the viewers report adversely to the claimant, the board should confirm the report and order the highway opened. But it is provided by Sec. 21, *supra*, that in case the viewers assess the remonstrators' damages, it then becomes a question for the board to decide whether the damages shall be paid out of the county treasury, and if the board, after due consideration of all the circumstances, shall be of opinion that the highway will be of sufficient importance to the public, they must order the costs and damages to be paid out of the county treasury, and cause the highway to be opened. In coming to a conclusion upon this question as to whether the damages shall be paid out of the public money, the board should ask this question: Will the benefit the public will derive from the location and opening of this highway surpass the burthen they will have to undergo in paying the damages? After they have come to a conclusion upon this point, they must enter that conclusion of record, and if they shall determine that the expense will overrun the profits, they must so decide and enter an order of record to that effect. In arriving at a conclusion upon this point, the board should call to their aid all the evidence necessary for them to arrive at a correct conclusion upon the same. For this purpose they may subpœna, examine witnesses and examine maps, and all the other documents that they may deem necessary, or from which they can obtain any information in reference to the subject under consideration.

VACATION OF PUBLIC HIGHWAYS.

Having treated of the different methods of establishing public highways in this State, we will now give the different methods of vacating and establishing highways. It is provided by section 43 *supra*, that "all highways already laid out, or which may hereafter be laid out, which shall not be opened and used within six years from the time it is laid out, shall cease to be a highway for any purpose what-

ever. But if any distinct part of it has been opened and used within six years, such part is a public highway. Under this provision there must, in order to establish a public highway, be an opening of the same by the proper authority, within six years from the time it was laid out and established, and it must be used by the public as a highway within that time.(*w*) If it is opened and not used within six years, it ceases to be a highway; and if it is used and not opened by the proper authorities, it will not be a highway unless the use has been to such an extent as to establish it by dedication. The question as to whether a public highway which has been established by the proper authorities can be vacated by non-use, is not well settled by the authorities. Professor Greenleaf, in his work on evidence says, "In the case of a public way no length of time during which it may not have been used will operate of itself to prevent the public from resuming the right, if they think proper."(*s*) This remark of the professor is not very explicit and clear; but we think that he intends to convey to his readers this idea: that in order to vacate a public highway by non-use, that has been established by the proper authorities, there must be an abandonment by the public, and that after this the owner must re-enter and take possession. The public has the right to use the land only, and whenever they cease to exercise this right, the true owner can resume his former privilege and take possession and control the land. The supreme court of the State of Illinois, in the case of Grub vs. Nichols, says: "Where it appears that the public have ceased to travel a road, and have acquired another which accommodates public travel, a jury would be warranted in presuming an abandonment of the first road."(*m*) We are of the opinion from the best authorities we have been able to examine, that the right to use a public highway may be forfeited by the people by non-user; but the exact length of time the road must be out of use in order to work a forfeiture, is a

(*j*) White vs. Conover, 5 Black. 462; 8 Black. 208; 9 Ind. 103; 10 Ind. 391; 1 G. & H. p. 365, sec. 39. (*s*) 2 Greenleaf, sec. 665. (*w*) 1 G. & H. 365, sec. 43. (*m*) 36 Ill. 92; 27 Ill. 414; 20 Ill. 181.

question that is not settled. But we think a total abandonment by the public for a considerable length of time, say for two or three years, would be sufficient to raise a presumption of a forfeiture. But this is a question of fact that must to some extent be governed by the circumstances of each case.

But all public higways, or any part of them, without regard to the way and manner they may have been established, may be vacated by the board of county commissioners of the proper county, on petition asking for such vacation, signed by twelve freeholders of the county, six of whom must reside in the immediate neighborhood of the highway to be vacated.

Form for petition to vacate:

To the Honorable Board of Commis'ners of Vermillion County:

We, the undersigned freeholders and residents of said county, would represent to your honors that a certain public highway situate in Vermillion county, Indiana, which is described as follows: Commencing at the north-east corner of section 18, township 17 north, range 9 west, running thence east one mile to the north-east corner of section 17, township and range aforesaid, thence due north one mile to to the north-east corner of section 8, township and range aforesaid, has ceased to be used by the public, and is not of public utility. We therefore pray your honors to vacate and abolish said highway for the reason aforesaid. The said highway passes over the land of A. B., C. D., E. F. And your petitioners will ever pray.

A. B.	S. F.
C. D.	L. M.
E. F.	M. L.
G. H.	T. H.
H. H	G. W.
O. P.	H. E.

Before the presentation of the petition to the board, you must give notice of the time and place your petiton will be presented, by posting up in three of the most pub-

lic places in the neighborhood of the road written or printed notices for at least twenty days before the meeting of the board, or you may publish the same in some newspaper published in the county, for three weeks successively before the meeting of the board.

Form of notice:

NOTICE.

Notice is hereby given that there will be a petiton presented to the board of commissioners of Vermillion county, at their June session, A. D. 1873, for the vacation of the following highway, located in Vermillion county, Indiana, commencing at the north-east corner of section 18, township 17 north, range 9 west, running thence east one mile to the north-east corner of section 17, township and range aforesaid, thence north one mile to the north-east corner of section 8, township and range as aforesaid. Said highway passes over the land of A. B., C. D., and E. F.

THOMAS SWAN.

On the presentation of your petition you must prove that the twelve persons who signed the same are freeholders of the county in which the road is located, and that six of them reside in the immediate neighborhood of the highway; that you gave notice, either by posting up notices twenty days in three of the most public places in the neighborhood of the road, or by publishing the same in the paper. This you can do by affidavit or by oral testimony. For forms see ante p. —— of this work. At the time set for presentation of the petition, any person wishing to object to the proceeding must appear before the board and make his objections. For forms, see ante p. —— of this work.

As it is provided by section twenty-three *supra*, that, "If any one or more freeholders residing in such county, along such proposed highway vacation or change, shall object to the same before final action thereon, as not being of public utility, other viewers may be appointed," &c. Having, in our remarks upon remonstrance, &c., treated upon

this question, we shall give the form for an objection under this section, and refer our readers to ante p. 195 of this work.

Form of objection:

To the Honorable Board of Commis'ners of Vermillion County:

We, the undersigned resident freeholders of Vermillion county, Indiana, would represent to your honors that we reside along the following highway, in said county, commencing at the north-east corner of section 18, township 19 north, range 9 west, running thence due east one mile to the north-east corner of section 17, township and range aforesaid, thence north one mile to the north-east corner of section 8, township and range aforesaid. Believing that said highway is of public utility and a benefit to the neighborhood and public generally, we object to it being vacated for the reason that said vacation will not be of public utility.

W. S.
S. W.

On presenting this petition to the board, make proof that you are freeholders, that you reside in the county and near the highway proposed to be vacated.

As to the mode and manner of objecting for damages, see ante p. 196 of this work.

It is provided by section 45 *supra*, That all public highways which have been, or may hereafter be used as such for twenty years or more, shall be deemed public highways, and the board of county commissioners shall have power to cause such of the roads used as a highway, as shall have been laid out but not sufficiently described, and such as shall have been used for twenty years but not recorded, to be ascertained, described and entered of record.(*t*) The statute gives no instruction how to proceed in cases of this kind, but we think that the land owner, over whose land the road passes, ought to be notified of the time and place that the proceeding is to take place. But perhaps this is

(*t*)Act 1867, p. 133.

unnecessary, from the fact that every man is presumed to know the law, and if the public has used a road running through an individual's land as a highway for twenty years, he is presumed to know that it is a public highway. We think that the better way to proceed in such case, is to file a petition with the board, setting out the facts.

FORM FOR THE PETITION.

To the Honorable Board of Commis'ers of Vermillion County:

We, the undersigned, would represent to your honors that a certain road leading from the north-west corner of section 20, township 17, range 9 west, to the north-west corner of section 19, same township and range, has been used by the public for a public highway for more than twenty years. We therefore pray your honors to ascertain the fact and describe said road by its accustomed boundaries and enter it of record as a public highway. A. H.
H. A.

On the presentation of your petition to the board make proof that the road has been used for a highway for twenty years or more. It is sometimes thought that a highway can not be established under this section unless the entire route has been traveled and used by the public for twenty years. We think that if the route petitioned for has been used by the public in the main as a highway for twenty years, it will be sufficient. If there has been a slight deviation from the thread of the road which is being used to avoid an obstruction of any kind, it will not alter or change the road.(*f*) If the board, after hearing the proof, is satisfied that the road has been used by the public for twenty years or more, they must enter it of record, and order it kept in repair.

Section 15, *supra*, provides for vacation and change of a public highway, and it frequently happens that farmers and land owners desire to change a highway from one place to another, or rather to vacate one road and establish another,

(*f*) Gentlemor v. Soule, 32 Ill. 271; Act of 1867, p. 133.

which will be of equal value to the public, on a different route. When this happens he can accomplish both of his objects at the same time. We give the form of the petition

PETITION FOR VACATION AND CHANGE.

To the Honorable Board of Commissioners of Vermillion county:

We, the undersigned, would represent to your honors that the public utility demands that the following highway situated in Vermillion county, Indiana, be vacated and changed, to-wit: Commencing at the south-east corner of section 8, township 17 north, range 9 west, running due north one mile to the north-east corner of said section. We therefore pray your honors to vacate said highway and change and locate it on the following route in said county: Commencing at the north-east corner of section 17, township and range as aforesaid, thence due east one mile to the south-east corner of section 9, township and range aforesaid, thence due north one mile to the north-east corner of said section. The highway proposed to be vacated passes over the land of W. S., T. C. W., J. H. and C. D., and the road proposed to be located passes over the land of G. H., T. H. and S. M. And we will ever pray.

W,	R,
V,	Q,
U,	P,
T,	O,
S,	N,
K,	L,

The same notice must be given in this case as in other cases for the location and vacation of highways. You must make the same proof as to the qualification of your petitioners as in other cases.

It is provided by section 24, *supra*, that whenever any person shall procure the establishment of a highway, private or public, by change of one already established on or across his own land, before the same can be received by the public he must make the new road as good as the old one.

This part of said section is ambiguous and hard to understand, and it can only be explained by former statutes bearing on the same point. The statute of 1838, section 12, p. 494, provides that "Any person or persons wishing to cultivate land through which any county road may run may petition the board for permission to turn such road on his or her or their own land," &c. Sect. 32 of the act of 1843, Rev. Statutes, p. 330, provides that "Any person or persons wishing to enclose land through which any State or county highway may run may petition the board for permission to turn such highway on his or her or their own land." By reference to these statutes we have come to the conclusion that an individual who owns land in this State over which a highway may pass, may, on petition signed by himself alone, have the same vacated and changed to a different route on his land. But in order to do this he must own all the land over which the road proposed to be vacated and the road proposed to be located runs.(*g*)

PETITION.

To the Honorable Board of Commis'ers of Vermillion County:

The undersigned, your petitioner, would represent to your honors that he is the owner of section 19, township 17 north, range 10 west, situated in Vermillion county, Indiana, and that a public highway leading from Eugene to Newport in said county runs through said land on the half section line of said section, commencing at the south side and runs the whole length of the same to the north side of said tract; that the said road is forty feet wide, and occupies about five acres of the best land of said section. And he further represents that it would be much to his advantage to have said highway vacated and changed to the following route: commencing one quarter of a mile east from the south-west corner of said section, running thence due north one mile; he says that he is the owner of all the land over which the now existing highway passes, and also owns all the land over which the proposed road will run. He therefore prays your

(*g*) Foster v. Swear and others, 8 Blackf. 289.

honors that you vacate, change and locate said highway as set out above at the expense of your petitioner. And he will ever pray. JOHN JONES.

Before presenting this petition to the board you must give twenty days' notice of the time and place the same will be presented. For forms see notices on *ante* p. ——, of this work; or by three weeks' notice in a newspaper published in the county. Any person who lives in the neighborhood of the road may appear and object to such change for any reason that he may see proper to present. If the board is satisfied that the petition is correct, and that the proper notice has been given, they must appoint three disinterested viewers to examine said proposed vacation, change and location, and if they are satisfied that the same will not be detrimental to the public interest they must so report at the next meeting of the board, and the board must enter an order that the prayer of the petitioner be granted, if the petitioner will make the new road as good as the old one, and a time should be fixed for the petitioner to prepare the new road for use. At the end of this time the petitioner should report to the board that he has said road ready for use; the board, if satisfied that such is the case, they should accept said new road and order it kept in repair, vacate the old one and make a final order in the premises.

Having treated of the location, vacation and change of highways running in one county, we now come to highways running in more than one county. The statute is as follows:

Highways Running into More than One County.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That if twenty-four freeholders of any county shall petition the board of commissioners of such county for the location, change or vacation of any highway running into more than one county, six of which freeholders shall reside in the immediate neighborhood of such highway, setting forth in such petition the beginning, course and termination of the highway proposed to be located or vaca-

ted, or of the change desired to be made, together with the names of the owners and occupants or agents of the lands through which the same may pass, the auditor of such county shall notify the auditors of all the counties in which such highway is to be run, vacated or changed, of the filing of such petition, accompanying such notice with a copy of such petition, which shall be by such auditors laid before their respective boards of commissioners at their next session thereafter, when such boards shall appoint commissioners according to the regulations hereinafter provided.

SEC. 2. Upon the board of commissioners of the county, in which such petition is first filed, being satisfied that notice thereof has been given at least twenty days before the session of such board at which such petition is to be heard, by publication in a newspaper of each county in which such highway is to be run, vacated or changed, for three weeks successively, or by written or printed notices posted up in three of the most public places in the neighborhood of such highway, in each of such counties, such board shall appoint a commissioner to examine such highway.

SEC. 3. Immediately upon the appointment of such commissioner, the auditor of such county shall notify the auditors of all the counties interested, specifying in such notice the time and place when such commissioners shall meet to commence the examination of such highway; when such last mentioned auditors, and the auditor of the county where such petition is first filed, shall issue precepts to the sheriffs of their respective counties, directing them to notify such commissioners of such appointments, and the time and place of their meeting.

SEC. 4. Each of such boards shall appoint one commissioner, and in case the number is equal and can not agree, the commissioners thus appointed shall appoint another who shall perform the same duties, and receive the same fees as those first appointde.

SEC. 5. At the time and place designated in the notice given by the auditor of the county in which such petition is first filed, such commissioners shall meet, and having first

taken an oath, to be administered by some authorized officer, to faithfully perform their duties, shall proceed to examine the highway proposed to be located, vacated or changed, and in such examination may employ a surveyor, and a necessary number of chain carriers and markers.

SEC. 6. After such commissioners shall have completed their examination, they shall draw up a report of their proceedings setting forth the highway proposed to be located, vacated or changed, by course and distance, and recommending therein according to the opinion of the majority of such commissioners, either that the prayer of such petition shall be granted or rejected, a copy of which report shall be returned to the board of commissioners of each of the counties interested at their next session thereafter.

SEC. 7. Upon the return of such report, the board of commissioners shall proceed to determine the prayer of such petition, and if there be no remonstrance against the same, and it is recommended in such report, such board shall declare it granted, and shall direct the auditor of such county to notify the auditors of all the other counties interested thereof; when, if there be no remonstrance pending in either county interested, the auditor of each of such counties shall notify the supervisors of the road districts in his county through which such highway passes, or the change is made, when such supervisors shall open so much of such highway as lies in their respective districts, provided that in case of a highway declared vacated, no notice to supervisors shall be necessary.

SEC. 8. If such commissioners do not recommend the prayer of such petition be granted, the boards of commissioners of the counties interested, shall order it to be dismissed; but such order of dismissal shall not be a bar for other petitions thereafter concerning the same subject matter.

SEC. 9. If, at the session of the board of commissioners at which the report of the commissioners appointed to examine such highway, is presented, any person shall remonstrate against granting the prayer of the petition, setting

forth in writing that he is damaged in a sum mentioned, by the location, vacation, or change of such highway, to the truth of which he shall take and subscribe an oath, such board shall appoint three persons, residents of such county, to review that part of such highway whereof such complaint is made, and shall direct the auditor of such county to notify all the auditors of the other counties interested, of such remonstrance, when further proceedings touching such petition shall be continued until the ensuing term of such boards.

SEC. 10. Such reviewers, at the time and place designated by the board of commissioners to whom such remonstrance is presented, shall meet and have taken an oath before some officer authorized to administer oaths, to faithfully perform their duties as such reviewers, shall proceed to examine that part of such highway, or the change thereof complained of, and having done so, shall at the next term of such board, report their proceedings to such board, in which report they shall specify the amount of damages sustained by the person remonstrating, if any; whereupon such board shall determine whether the damages assessed are greater than the utility of the proposed highway or change, and if they shall be of opinion that the prayer of the petition should not be granted, they shall direct the auditor of such county to notify the auditors of the other counties interested thereof, and continue further proceedings in the premises until the next term thereafter; but if they shall be of opinion that the damages should be paid and the prayer of the petition granted, they shall direct such auditor to notify the auditors of the other counties interested of the amount of such damages, and shall continue further proceedings to the next term thereafter.

SEC. 11. If more freeholders residing along the highway proposed to be located, or vacated, or change to be made, than those of the same county petition therefor, remonstrate against granting the prayer of such petition therefor, the board of commissioners of such county shall decide against such petition, and shall direct the auditor of such county to notify the auditors of all the other counties interested

thereof, and continue further proceedings in the premises until the ensuing term.

SEC. 12. At the next term after the reception of notice of any remonstrance, and the proceedings thereon, the auditors of such counties shall lay the same before their respective boards of commissioners, who shall determine whether the prayer of the petition ought to be granted, and shall notify the auditor of each county interested thereof; and if the boards of commissioners of a majority of such counties decide in favor of such petition, at the term of such boards when the same is ascertained, such highway shall be declared located, vacated or changed, and such supervisors notified thereof as hereinbefore provided, but if a majority of such boards decide against such petition, it shall be declared dismissed whenever it is so ascertained; and all damages declared assessed shall be paid equally by the counties interested; and if such reviewers shall fail to assess any damages, the person asking the same shall pay the cost of such review.

SEC. 13. Such commissioners appointed to examine such highway, and such reviewers, shall receive each one dollar and fifty cents for every day they may be necessarily employed, and such surveyor, chain carriers and markers shall receive such compensation as the board of county commissioners, where such petition is first filed shall deem reasonable, to be paid equally by each county interested.

SEC. 14. Whenever a highway is located, vacated, or changed, the order therefor shall be entered of record in the order book of the board of commissioners of each county interested, in which county such highway or change thereof shall be particularly described by course and distance.

The above fourteen sections relates entirely to the location, change and vacation of public highways running in more than one county. In order to establish a highway under these sections, the first thing to be done is to get up your petition. In drafting the petition be careful to get in it all the requirements of the law, otherwise you may be put to useless trouble and costs. The petition should set forth the beginning, course and termination of the highway

proposed to be located and established, together with the names of each owner and occupant, or agent, of the land through which the same may pass. If the land is unoccupied, and you are not acquainted with the name of the owner or owners, and you can not ascertain the same, the statute is silent as to what shall then be done. The practice act provides "that when the plaintiff is ignorant of the name of the defendant such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered the pleading or proceeding may be amended accordingly either before or after service of the summons."(178) But this would not be a safe rule to follow in drawing a petition of this kind, because the law declares in the most positive manner that you must set out the names of the owners, &c. The better way under such circumstances would be to designate the land as the S. W. $\frac{1}{4}$, &c., the name of the owner being unknown to your petitioner. At least you should designate the land in such a way that if the owner should happen to see the petition he would know whose land was meant.(179) As to who are proper petitioners see *ante*, p. ——.

The petition must then be signed by twenty-four freeholders, six of whom must reside in the immediate neighborhood of the road.

FORM OF PETITION.

To the Honorable Board of Commissioners of Vigo County:

The undersigned, residents of said county, would represent to your honors that the public convenience demands the location and establishment of a public highway through the counties of Vigo and Parke, in the State of Indiana, on the following route: Commencing at the south-east corner of section 9, township 15 north, range 10 west, running thence due north on the section line dividing the aforesaid section one mile to the county line dividing the county of Vigo from the county of Parke, thence due west on said

(178) 2 G. & H., p. 119, sec. 100. (179) Elston et al. v. Board of Trustees of Crawfordsville, 20 Ind. 272.

county line one mile to the north-west corner of said section, thence due north on the section line dividing section eight from section seven, township and range as aforesaid, one mile, there terminating. Said highway will pass over the lands owned and occupied by John Smith and Thomas Brown, in the county of Vigo, and over the lands owned and occupied by John Saylor, Henry Helt, Smith Robb and John Taylor, in the county of Parke. We therefore pray your honors to locate and establish a public highway on the above route, in all things according to law.

A., E., I., M., Q., U.,
B., F., J., N., R., V.,
C., G., K., O., S., W.,
D., H., L., P., T., X.

But before any action can be taken on your petition by the board, you must give not less than twenty days' notice of the time that the petition will be presented to the board for their consideration, by publication in a newspaper in each county for three weeks successively, or by written or printed notices in three of the most public places in the neighborhood of such highway in each of such counties for the same length of time.

FORM OF NOTICE.

Notice.—Notice is hereby given that there will be a petition presented to the Board of Commissioners of Vigo county, at their June session, 1873, asking for the location and establishment of a public highway through the counties of Vigo and Parke, in the State of Indiana, on the following route: Commencing at the south-east corner of south-east quarter of section ——, township —— north, range —— west, running thence due north on the section line dividing section —— from section ——, township and range as aforesaid, through the county of Vigo to the county line dividing the county of Vigo from the county of Parke, thence due west on said county line one-half mile to a stake, thence due north through the county of Parke on the half section

(*d*) 1 Res. by G. & H., sec. 2, p. 359.

line dividing the north-east quarter of section ——, township and range aforesaid, from the north-west quarter of said section to the section line dividing section —— from ——, in township and range aforesaid, there to terminate Said public highway passes over lands owned and occupied by John Smith and Thomas Brown, in the county of Vigo, and over lands owned and occupied by John Saylor, Henry Bowers, Smith Robb and John Ray of the county of Parke.

April 1, 1873.(*l*) JOHN SMITH.

If notice is given by publication in a newspaper of each county take your notice to the printers and inform them of what you want, giving the time you desire the notice to be published, and be sure that you get it in time for three weeks successive publication before the board meets that you are to present your petition to. But if you give notice by posting up written or printed notices in three of the most public places in each county in the neighborhood of such highway, take your notices and post them up at least twenty days before the meeting of the board. At the time of the meeting of the board, at which you desire to present your petition, take your petition and a copy of the notice and go before the board, hand your petition to the auditor of the county and request him to mark the same filed. If the notice was by publication you must get the affidavit of the publisher of each paper to make an affidavit as to the time the same was published in their respective papers. If the notice was by posting up written or printed notices, take an exact copy of the notices with you when you go to present your petition. After this is done you can then introduce your evidence. You must then show that the persons whose names are attached to the petition are freeholders and residents of the county, that six of them reside in the immediate neighborhood(21) of the road, and that there are twenty-four in all.

You must show, also, that the highway passes over the

(*l*) The route should be the same in the notice as in the petition. (21) The words "immediate neighborhood," as used in the first section of the highway act, seems to be indefinite, and will be bent to suit the circumstance.

lands of the persons named in the petition and over no other. That the notices were posted up in three of the most public places in each county in the neighborhood of the (road) highway, and present a copy of the notice to the board, and inform them under oath that the same is a true copy of all the notices stuck up in each county. And before you leave, file all your papers with the board. If the board are satisfied that all the requirements of the law have been complied with, they must appoint a disinterested person commissioner to view the proposed location, vacation or change. After this is done the auditor of such county shall notify the auditors of all the counties interested, specifying in such notice the time and place appointed for the commissioners to meet to commence the examination of such highway, accompanying the same with a copy of the petition. On the reception of this notice the auditor of the county where the petition is sent must lay the same before the board of commissioners of his county. On the presentation of the notice and petition to such boards, they must immediately appoint one commissioner from their county. As soon as this is done the different county auditors of all the counties interested must issue their precepts to the sheriffs of their respective counties, commanding them to notify the commissioners of their appointment and the time and place fixed for them to meet. At the time and place designated in the notice by the auditor where the petition was first filed, such commissioners shall meet, and having first taken an oath, to be administered by some authorized officer, to faithfully perform their duties, shall proceed to view the highway proposed to be located, vacated or changed. After they have completed their examination, they must make out their report in writing, setting forth the highway proposed to be located, vacated or changed by course and distance, and must each sign the same and file a copy with the board of commissioners of each county interested, and must recommend in said report that the prayer of the petition be granted or rejected. At the next meeting of the board of commissioners the viewers must file their report; on the filing of the same, the board of commissioners must pro-

ceed to determine the prayer of the petition, and if there be no remonstrance against the same, and it is recommended in the report of the viewers, the board must grant the prayer of such petition, and shall direct the auditor of the county to notify the auditor of all other counties interested thereof; when, if there be no remonstrance pending in either county interested, the auditor must notify the supervisors of the different road districts in his county through which the road passes of the action of the board, and the supervisors of each district must proceed to open said road according to law. But if the viewers report unfavorably to said road, the case will be dismissed; but will, under section 8 of the above act, be no bar to another proceeding of the same character.

But if, at the session of the board of commissioners, when the report of the viewers is presented, any person shall remonstrate against granting the prayer of the petition, setting forth in writing that he is damaged in a certain sum, which he must mention, by the location, vacation or change, to the truth of which he shall take and subscribe an oath, such board shall appoint three persons, residents of such county, to review that part of the highway whereof the complaint is made. On this being done, the board, when the remonstrance is filed, must direct their auditor to notify all the auditors of the other counties interested of the filing of the remonstrance, and the case shall then be continued. The reviewers appointed by the board must meet at the time and place designated by the board from whom they received their appointment, and after taking the oath required by law, must proceed to examine the premises and assess the damages, if any, that such individual will sustain by reason of the location, vacation or change complained of. And after they have made a thorough examination of the proposed location, vacation or change, they must at the next meeting of their county board report to them their proceedings in writing and give the amount of damages that such remonstrator will sustain by reason of the location, vacation or change of such highway. The board to whom the report is made must take the same under advisement,

and after giving the same a careful consideration, if they are of the opinion that the damages assessed are greater than the utility of the proposed location, vacation or changes of such highway, and if they are of the opinion that the prayer of the petition ought not to be granted, they must so decide; and they must direct the auditor of their county to notify the auditors of the other counties interested, and the cause must be continued until the next term of the commissioners' court. But if they are of the opinion that the damages are reasonable and ought to be paid, and the prayer of the petition granted, they must direct their auditor to notify the auditors of the other counties interested of the amount of such damages, and shall continue further proceedings to the next term thereafter.

If more freeholders living along the proposed highway to be located, vacated or changed, than those petitioning for the same, shall remonstrate against granting the prayer of such petition thereof, the board of commissioners of that county must decide against such petition, and they must direct the auditor of such county to notify the auditors of all the other counties interested, and all proceedings in the premises must be continued until the next term.

At the next term after the reception of notice by the auditors of the different counties interested, of the filing of the remonstrances, the auditor shall lay such remonstrances before them, and each board shall determine for itself, whether the prayer of the petition ought to be granted, and each shall inform the others of their action in the premises, and if the majority of such boards shall decide in favor of such location, change or vacation, at the term of such boards, when the same is ascertained the highway shall be declared located, vacated or changed, and such auditors must notify the supervisors in the different road districts of his county through which said road passes, of the fact, and direct them to open said road according to law. But if the majority of said boards shall declare against such road, the same shall be dismissed whenever it is so ascertained, and the costs and damages shall be paid equally by all the counties interested; but if the reviewers shall fail to assess

any damages, the costs of such review must be taxed against such remonstrator. The viewers in such cases are allowed one dollar and fifty cents per day, and chain-carriers, and surveyors, and markers shall be allowed such sum as the board of commissioners of the county where the petition was first filed shall deem reasonable.

Whenever a highway is located, vacated or changed under the above fourteenth section, the order thereof shall be recorded in the order-book of each county interested in the road, and it must be particularly described in said record.

Form of remonstrance for damages:

To the Honorable Board of Commissioners of Parke County:

The undersigned, your petitioner, would represent to your honors that he is the owner of the north-east quarter of section ——, township —— north, range —— west, and that the highway known as the Taylor road, running through the counties of Vigo and Parke, which commences at the south-east corner of the south-east quarter of section ——, township and range aforesaid, running thence north on the section line dividing section —— from section ——, township and range aforesaid, one-half mile to the county line dividing the county of Vigo from the county of Parke, running thence due west one-half mile on the county line to a stake, thence due north on the half section line dividing the north-east quarter of section —— from the north-west quarter of said section, township and range aforesaid, there terminating, which petition for the location of the above highway is now pending before your honors; your petitioner remonstrates against your honors granting the prayer of said petition, for the reason that he is the owner of the north-east quarter of section ——, township ——, range —— west, and that said highway passes over the same, and that he is damaged by reason of the location of said road, or public highway, in the sum of one thousand dollars in this: (here give the reason why he is damaged) he therefore asks your honors to appoint

three reviewers to view said highway, and assess the damages that he may sustain by the location of the said highway, and he will ever pray.

THOMAS BOWERS.

Thomas Bowers being duly sworn, upon his oath says that the matters and things set forth in the above petition are true as he verily believes.

Form of remonstrance under section 11:

To the Honorable Board of Commissioners of Vigo County:

The undersigned, your petitioners, would represent to your honors that we reside along the line of highway known as the Taylor Road, in Vigo county, Indiana, which road is proposed to be located and opened through the counties of Vigo and Parke, on the following route, commencing at the corner of the south-east quarter of section —, township — north, range — west, running thence due north on the section line dividing section — from section—, township and range aforesaid, one-half mile to the county line, thence west on said county line one-half mile to a stake, thence north on the half section line dividing the north-east quarter of section — from the north-west quarter of said section, township and range aforesaid, one-half mile to the section line dividing section — from section —, township and range aforesaid, thence to terminate. The petition for the location of a highway is now pending before your honors. We think said highway, if established, would not be of public utility. We therefore remonstrate against the granting of the prayer of said petition, and against the location of said highway, as prayed for in the petition. June 1st, 1873.

[Here get the names of more freeholders residing along said highway than signed the petition.]

Report of Viewers under section 6 *supra:*

To the Honorable Boards of Commissioners of Vigo and Parke Counties:

We, John Hunt, who was appointed by the honorable

board of commissioners of Parke county, at its session in June, 1873, and Thomas Dowling, who was appointed by the honorable board of commissioners of Vigo county, at its June session, 1873, commissioners to examine the following highway, to be located and established through Vigo and Parke counties, on the following route, commencing at the south-east corner of the south-east quarter of section —, township — north, range — west, in Vigo county, running thence north on the section line dividing section — from section —, township and range aforesaid, one-half mile to the county line dividing the county of Vigo from the county of Parke, thence west on said county line one-half mile to a stake, thence north on the half section line dividing the north-east quarter of section —, township and range aforesaid, from the north-west quarter of said section, one-half mile to the section line dividing section — from section —, in township and range aforesaid, there terminating, would report to the boards that, after taking an oath before Esquire Taylor, to faithfully perform our duties as such viewers, we met at ——, in Vigo county, in the State of Indiana, on —— day of ——, 1872, pursuant in all things to the order of the board of commissioners of Vigo county; we did then and there proceed to view and examine said proposed highway, and after a thorough examination, and acquainting ourselves with the wants of the neighborhood, we are of the unanimous opinion that the prayer of the petition ought to be granted. We therefore recommend accordingly. We, in our examination, marked and staked the aforesaid road off, by metes and bounds, by driving stakes on each side of said route.

June —, 1873.

JOHN HUNT,
THOMAS DOWLING, } *Commissioners.*

Report of Viewers under Sections Nine and Ten, Supra.

To the Honorable Board of Commissioners of —— County:

The undersigned, citizens of the county of ——, who were appointed by your honors at the June session, viewers to review a part of the public highway running through the

counties of Parke and Vigo, known as the Taylor Road, and which is located on the following route: Commencing at the southeast corner of the southeast quarter of section —, township — north, range — west, running thence north on the section line, dividing section — from section —, in township and range aforesaid, one-half mile to the county line dividing the county of Vigo from the county of Parke, running thence west on said county line one-half mile to a stake; running thence north on the half section line dividing the northeast quarter of section —, township and range aforesaid, from the northwest quarter of said section, one-half mile to the section line dividing section — from section —, township and range as above, there terminating, beg leave to report to your honors that on — day of ——, 1873, we met at the house of ——, near said road, and after taking the oath required by law to faithfully discharge our duties, we did proceed to that part of the above described highway the locating of which was said to be damaging to the farm and residence of Thomas Bowers, and after a careful examination of the location of the highway and the premises of Mr. Thomas Bowers, we are of the unanimous opinion that he will be damaged by reason of the location of the above described highway in the sum of five hundred dollars. We therefore assess his damages at that amount.

HENRY TATE,
JOHN DOE,
CHARLES NEWMAN, } *Viewers.*

June —, 1873.

Form of Notice of the Auditor under section 1.

AUDITOR'S OFFICE, TERRE HAUTE, Indiana,
June ——, A. D. 1873.

Mr. John Tate, Auditor of Parke County, Indiana:

You are hereby notified that on — day of June, there was a petition presented and filed with the board of commissioners of Vigo county, Indiana, for the location of a public highway through the counties of Vigo and Parke, signed by twenty-four resident freeholders of this county, as is shown by the petition, a copy of which is hereto attached, marked A.

In witness whereof I have hereunto set my hand and seal of my office.

[L. S.] JOHN SHORT, *Auditor of Vigo County.*

Form of notice by the Auditor in section 9, *supra.*

ROCKVILLE, Parke Co., Ind., June, A. D., 1873.

To Mr. John Short, Auditor of Vigo county, Indiana:

The Board of Commissioners of the county of Parke have directed me to notify you of the fact that one Thomas Bowers, on the —— day of ——, A. D., 1873, filed with the Board of Commissioners of the county of Parke, a petition in writing, and under oath, remonstrating against granting the prayer of the petition and the location of the highway known as the Taylor road, running through the counties of Vigo and Parke, for the reason that he will be damaged in the sum of one thousand dollars by reason of the location of the aforesaid highway across his farm, which will more fully appear by reference to the petition, a copy of which is hereto attached marked B. In witness whereof I have hereunto set my hand and official seal.

[SEAL.] J. T., *Auditor of Parke county.*

Form of notice under section 7, *supra.*

TERRE HAUTE, IND., June, A. D., 1873.

To John Tate, Auditor of Parke county, Indiana:

The Board of Commissioners of Vigo county, at their June session, 1873, directed me to notify you that at the aforesaid session the viewers appointed by the honorable Board of Parke county and the honorable board of Vigo county, to view a proposed highway running through both of the aforesaid counties, and which is known as the Taylor road, having on —— day of —— reported favorable to the location of said highway and in favor of the prayer of the petition, and the Board of Commissioners of the county of Vigo thereupon, by an order entered of record, declared the prayer of the petition granted, a copy of which order is herewith attached marked C. All of which you will take notice.

In witness whereof I have hereunto set my hand and affixed the seal of the Board of Commissioners of Vigo county.

[SEAL.] JOHN SHORT, *Auditor of Vigo County.*

Form of petition for vacation of highways running in more than one county.

To the Hon. Board of Commissioners of Vermillion county:

We, the undersigned, resident freeholders of said county, would represent to your honors that a certain highway running through the counties of Vermillion and Vigo, in the State of Indiana, which commences at the north-west corner of section 35, township 17, range 10 west, in Vermillion county, Indiana, running thence south one mile to the south-west corner of said section, thence south through the county of Vigo one mile to the north-west corner of section 2, township ——, range 9 west, is no longer of public utility, we therefore pray your honors to vacate said highway for the reason aforesaid. Said highway passes over the land of J. L., H. S. and C. W. And we will ever pray.

W.,	O.,	A.,
Y.,	M.,	E.,
U.,	N.,	F.,
S.,	P.,	B.,
L.,	Q.,	D.,
H.,	C.,	K.,
M.,	G.,	T.,
Z.,	R.,	I.

As to notice, &c., on the filing of this petition, see Highways running in one county.

NOTES.

In the case of Little vs. Hamilton and others, 24 Ind. 146, appeal from the Hamilton Circuit Court, Elliott, C. J., says:

Thompson and others, to the number of twelve, filed a petition before the Board of Commissioners of Hamilton county praying for the location and establishment of a public highway in said county; and the record states that "the board, after examination of the matter, being satisfied that the requirements of the statute in such case made and provided have been complied with by the petitioners in all matters relating to the petition herein," appointed viewers to view

the proposed highway, and report as to its public utility at the next session of the board. At the succeeding term of the board two of the viewers appointed reported in favor of the proposed highway. O'Brien then "appeared as the friend of the court" and filed a written dismissal of one of the petitioners, and also offered to file an affidavit that James Carson, another of the petitioners, was not a resident of Hamilton county, &c., and that the names of John and Benjamin Devaney were on that day placed on the petition. The court refused to entertain the motion, and rightly. O'Brien was not a party to the record and had no right to be heard in the case at that time. John Little, resident, through whose land the proposed highway passed, then appeared and filed his remonstrance against it. The reasons assigned are: 1st. The proposed highway is not of public utility. 2d. That a part of it is already a public highway. 3d. Because there is another road within one-fourth of a mile of the one proposed. The board thereupon appointed three reviewers to review it, and the matter was continued.

At a subsequent session of the board Amos Pettyjohn, one of the petitioners, filed, as to himself, a dismissal of the petition, and then O'Brien again moved to dismiss, because there were not twelve freeholders of the county parties to the petition. The board overruled the motion, and, we think, correctly, because the names of twelve persons remained on the petition, who, from the statements in the record, we must presume were resident freeholders of the county.

The persons appointed to review the proposed highway, afterward reported in favor of it as one of public utility. Little then filed a claim for damages, and the board appointed viewers to assess and report the same, if any, to the board.

The last named viewers reported that the proposed highway was of public utility, and that the said Little would sustain no damage thereby. The board thereupon ordered a record of said highway to be made, and that the same should be opened and kept in repair.

Little appealed to the circuit where the case was tried by a jury, who found that the highway proposed was of public utility, and against Little's claim for damages. Motion for a new trial overruled and judgment on the finding of the jury, that the road is of public utility, and against Little for costs.

Little appeals to this court. Before the trial of the cause in the circuit court, he filed the affidavit of James Carson, one of the petitioners, stating that he was not, at the time the same was presented to the Board of Commissioners, a resident of Hamilton county, and thereupon moved the court to dismiss the cause, on the ground that there were not twelve resident petitioners of the county joining in the petition at the time it was presented to the Board of Commissioners. The circuit court overruled the motion, and that ruling is now urged as a cause for reversing the case.

We do not think the court erred in overruling the motion. The objection goes to the capacity of one of the petitioners to join in the petition; and, as the objection did not appear on the petition, if it could have been presented at any time after the appointment of the first viewers, it should have been raised by a plea in abatement, and not by motion. But even if raised by such plea in the circuit court, it would have been too late. The statute provides that if the objection be not taken "either by demurrer or answer, the defendant shall be deemed

to have waived the same, except only the objection to the jurisdiction of the court over the subject of the action," &c. 2 G. & H., § 54, p. 81.

The provision is found in the civil code, but is applicable to trials before the Board of Commissioners. The ninth section of the "act providing for the organization of county boards," &c., 1 G. & H., 249, provides that "such commissioners shall adopt regulations for the transaction of business, and in the trial of causes they shall comply, so for as practicable, with the rules of conducting business in the circuit court." Little appeared in the commissioners' court, and made no objection to the capacity of the petitioners to file the petition, but answered to the merits of the petition by remonstrance, denying that the proposed highway was of public utility. John H. Thomas and Benjamin Devaney, two of the petitioners, appeared and filed in the circuit court a written dismissal of the cause as to themselves. Upon which Little again moved the court to dismiss the petition, which motion the court overruled. He then filed an answer in abatement, stating all the facts upon which the several motions to dismiss were founded, and verified it by an affidavit. The court sustained a demurrer to the answer, which is assigned as error. By the averments in the answer it is shown that by the dismissals filed by a part of the petitioners, the number remaining was reduced below twelve, and it is therefore argued by the appellant's council, that the dismissal by a part of the petitioners ousted the circuit court of jurisdiction of the cause, and that the court erred in not sustaining the plea in abatement.

The question presented is not free from doubt. It arises in a case belonging to a class in which the rules of practice are not well defined by statute, and seems to present a proper occasion for us to indicate what we regard as a proper rule of practice in such cases, in the hope that it may assist in furnishing a guide which will relieve the subject of some difficulty.

The facts necessary to give the commissioners jurisdiction in the matter were: 1st. That the requisite notice of the petition had been given. 2d. That the petition was signed by twelve freeholders of the county. 3d. That six of the petitioners were of the immediate neighborhood of the proposed highway.

The board had authority to do nothing until these facts were shown to exist. As to the notice, the statute certainly so provides; and as to the other jurisdictional facts, it may not be an unfair construction to hold that it requires them also to be shown, before any steps can be taken toward granting the prayer of the petition. The facts are required to exist, to give the commissioners jurisdiction. They cannot appoint viewers without entertaining such jurisdiction, and inasmuch as no adversary party is made in the petition, or provided for in the statute, whose duty it is to appear at the time it is filed, it would seem but reasonable that the commissioners should require of the petitioner proof of the facts necessary to give jurisdiction. The requirement of the statute, that notice of the petition should be given, it seems to us, implies that any freeholder of the county, or any person that may be interested in the subject-matter, may appear at the time the petition is presented, and contest any such jurisdictional facts; otherwise there would seem to be no object in requiring such notice. The time for this inquiry, then, precedes the appointment of viewers. It cannot be made afterward, and it must be made at that time, whether any one appears to

raise the objection or not. If any one should appear at the time the petition is presented, and raise the objection, we think he might do so, and produce evidence touching the question of jurisdiction, without a plea in abatement. If the objection is not made at that time, the finding and judgment of the board upon that subject, entered of record, is in such a case conclusive upon it. It is not doubted but that any petitioner may withdraw at any time before the question of jurisdiction has been passed upon by the board. Twelve in all, six of whom must be of the neighborhood, must ask for the road in order to put the proceedings in motion; but there would be great unfairness in permitting one of the twelve afterward to dismiss the case, and involve his fellow-petitioners in costs without their consent. It seems reasonable, however, that he should at any time be permitted to relieve himself of future liability, without injury to others, by dismissing the petition as to himself alone. This he may do, but it will not result in defeating the jurisdiction after it has once attached. Here the appellant appeared before the board, at the time the first viewers filed their report in favor of the road, and, under the statute, made himself a party by remonstrating against the public utility of the proposed highway, and by subsequently claiming damages. These questions formed the issues presented by him. He was defeated before the commissioners, and appealed the case to the circuit court, where the same issues were again presented for trial, and we think that he cannot complain that the jurisdiction of the court was not defeated by the dismissal of the petition by a part of the freeholders, as to themselves alone. It is objected that the finding of the jury is contrary to the evidence. The evidence is in the record. A large number of witnesses were examined, and their statements and opinions were very conflicting, both as to the public utility of the proposed highway, and on the question of damages. We cannot say that the evidence does not justify the finding, and therefore cannot disturb the judgment on that account.

The judgment is affirmed with costs.

In the case of Crossly and others vs. O'Brien and others, 24 Ind. 325, appeal from the Hamilton Common Pleas Court, Frazer, J., says:

This was a petition for the establishment of a public highway. Upon remonstrance, the board of commissioners appointed reviewers, who reported that the proposed road would not be of public utility, and, also, assessed the damages of John Crossley at $15, of Gustavus H. Voss at $5, and the P. & I. R. R. Co. at $10; and thereupon the board dismissed the petition, unless the petitioners would open and maintain the road at their own expense. The petitioners appealed to the court of common pleas, where the questions of the public utility of the road, and of the damages of the remonstrants, were submitted to a jury. The verdict was that the proposed road would be of public utility; that Crossley's damages would be $20, and that neither Voss nor the railroad company would be entitled to any damages. Over a motion for a new trial by the remonstrants, there was judgment upon the verdict, and the remonstrants appealed to this court.

The judgment must be reversed.

The verdict, upon the subject of damages especially, seems to have been rendered in utter defiance of all the evidence, and the court below should not have hesitated an instant to set it aside. Upon that subject there was no real conflict,

and the evidence itself appears on the face so reasonable and obviously true that we cannot doubt our duty. As to Voss, the evidence was that between four and five acres of his land, renting for $4 per acre, would be occupied, and two thousand rails would be required to fence it. There was no evidence whatever that the road would benefit him. As to the railroad company, the proposed road is, for a distance of about two miles and three-quarters, to run ten feet from the east rail of the railroad, except where pits and grades will prevent, thus occupying thirty feet of their right of way, the use for a part of which is absolutely necessary for railroad purposes. In many places the ditch would occupy all the space between the railroad and the proposed highway, rendering it impossible to fence for the protection of the railroad track. The property and trains of the company would thus be constantly endangered, and the use of its railroad be dangerous to passengers upon it. There is nothing whatever to indicate that the railroad company would derive any advantage from the proposed highway, nor is it easy to conceive how that would be possible. In such a state of facts a verdict that the company would sustain no damage whatever, is surely not to be permitted to stand, unless the court is in all cases wholly to refuse to exercise that authority over the verdict which it is as much its duty, in in a clear case, to exercise, as it is to try the case at all.

Upon the question of the utility of the proposed road, it appeared that it would be dangerous to the public to use it so near to the railroad; that there were other routes equally eligible in other respects, free from that objection, and which would not interfere with the corporate franchises of the railroad company. Now in determining the question of utility, it is, of course, necessary and proper to consider the wants of a single neighborhood. But we must also look beyond that. It would be absurd to shut our eyes to the interests of the whole community outside of the particular neighborhood which needs the sought-for highway, and it would be impossible to say that that was a highway of public utility which would be of great inconvenience to the people of a small given territory, but the establishment of which would render unfit for use another highway of vastly greater importance, or put in serious danger the many thousands of people having occasion to use that other more important way. In a legal sense, this railroad is such a public highway, though owned by and operated for the profit of a private corporation. It may be true that it is subject to the great sovereign right of eminent domain, and that it might be taken from end to end for a common public road, if it can be supposed to be possible that the public would, on the whole, be benefitted thereby. But, in the very nature of things, that state of facts would scarcely exist, unless no other practicable route for such common road could be had. And so, under like necessity, and where the interests of the great public required it, it may be that the franchises of the corporation, to a greater or less extent, might be taken for public use, and appropriated to a common highway. But in either case, the property, like that of a citizen, must be paid for. The Constitution of the State requires it; and neither courts nor juries have any power or right, in law or morals, to say otherwise. And then the amount of compensation becomes, in the very nature of things, an element to be considered in determining the question of public utility.

Will it cost the public more than it will be worth? In the case in hand, the evidence discloses no fact tending to show any necessity whatever for interfer-

ence with the franchises of the corporation. So far as there is any evidence upon that subject, (and the onus was upon the petitioners,) it tends to show that another and a better location for the road could be had, which would equally well accommodate the neighborhood.

But it is needless to pursue the subject. Enough has been said to show that, in view of the well-settled doctrine of the law touching the matter, the finding of the jury upon the question of public utility was clearly against the evidence. Whether the existing law authorizes, under any circumstances, the taking of any part of the property of the P. & I. R. R. Co. for a common highway, it is not necessary now to determine. Assuming that it may be taken, (an opinion to which we incline,) we have indicated, in general terms, the circumstances which would authorize it, and that they necessarily enter into the question of the utility of the proposed highway.

A number of other questions are agitated in the briefs, which may be shortly disposed of.

We are of the opinion that the petitioners had a right, under the statute, to appeal from the action of the board of commissioners, as they did. 1 G. & H., § 26, p. 364.

The petition represented that the lands of "——— Weaver," and others named, would be affected by the proposed road. Inasmuch as it appears in the record elsewhere that the lands of three Weavers, Michael, Benjamin and Peter, all of whom are petitioners, would be affected, we think the defect in the original petition is cured; and, at any rate, objections of that character, if not made before the appointment of viewers, ought not, we think, to be entertained afterward, especially if made by other parties.

Section 16 of the highway act, 1 G. & H., 363, which prohibits the viewers from locating a highway through an inclosure without the owner's consent, unless a good way cannot otherwise be had, is intended for the government of the viewers, and if they find such inclosure upon the route petitioned for, the owner of which does not so consent, and they find, upon examination, that a good route for a road can be otherwise had, the statute makes such facts an absolute bar to the establishment of a highway there, and the viewers are not possessed of a roving commission which gives them authority to locate a road in any place materially, if at all, different from that mentioned in the petition. The statute which requires them to locate it on the best ground ought not to be held to authorize them essentially to depart from a definite route petitioned for.

When the report is silent as to the interference of any such inclosure, it would be in accordance with the rule applicable in other cases, to assume that there was no such inclosure, or that the owner had given the requisite consent. When the case is appealed and tried by a jury a general verdict for the petitioners ought to be regarded as covering that question.

Where, as in this case, the question of utility and damages only are put to the jury, and the remonstrants do not ask that the question concerning inclosures shall be also submitted, we think it too late for them to raise a question about it afterward.

The statute is silent as to the practice, and that which prevails in ordinary suits is not exactly applicable to the subject. But there must be a practice, and the sooner it is settled the better. It approaches very near to legislation to do

it, and yet we cannot avoid it. That which we have indicated seems simply furnishing an easy mode of reaching the merits, and giving little opportunity to defeat the establishment of highways, unless they ought to be defeated.

We regard the course required by the statute, where inclosures interferes, as a thing not necessary to give jurisdiction, but a proceeding in the matter after the jurisdiction has been obtained. All the facts necessary to give jurisdiction in a road case must affirmatively appear by the record, else the jurisdiction will not be deemed to have been acquired.

But, as to proceedings in the cause after jurisdiction to proceed has been obtained, the same presumption in support of their regularity will be indulged as in ordinary cases with courts of general jurisdiction. This is a well established principle, and the conflict in the cases upon the subject, which must have perplexed every lawyer who has had occasion to examine them, has resulted from losing sight of the distinction between the facts required to entitle the tribunal to take jurisdiction, and those occurring afterward in the exercise of jurisdiction.

The judgment is reversed, with costs, and the cause remanded for a new trial.

In the case of Wilson and others v. Whitsell and others, 24 Ind. 306, appeal from the Howard Circuit Court, Elliott, C. J., says:

The appellants filed a petition before the Board of County Commissioners of Tipton county, at the December term, 1860, praying that the road leading from Tipton to Windfall, in Tipton county, and thence to Jerome, in Howard county, be so changed as to run as follows: "Beginning at the point where said road crosses the Peru and Indianapolis Railroad, thence in an easterly direction parallel with the southern boundary of the Indian Reserve, to land owned by Evans & Bro. and Joseph W. Wilson, to said Tipton, Windfall and Jerome road." Viewers were duly appointed to examine the proposed change, and at the March term, 1861, reported to the board that they had viewed the proposed change, and that it was of public utility, and recommended that it be made.

Whitsell and twenty-nine others, "citizens of Cicero township, in said county," thereupon filed their written remonstrance protesting against the proposed change as not being of public utility.

Upon the filing of the remonstrance the commissioners, under the provisions of the statute, appointed three other persons as viewers to review and report upon the public utility of the proposed change.

At the June term, 1861, the last named viewers reported that they had carefully reviewed the proposed change in said highway, and believed the same to be of public utility, and recommended that the same be located and established as described in the petition and notice to viewers, "provided the petitioners shall first open and put said new road in as good condition as the old one at their own expense." But on failure of the petitioners to comply with the above conditon, then we report against said change.

The commissioners thereupon entered the following order in reference to said report, viz: "Said report publicly read, and no person objecting to, it is therefore ordered that said report be recorded, and that the road be declared a public highway, to the width of forty feet, upon the conditions named in said report and upon no other, to-wit, that the said petitioners open and put said road in as good repair, as to clearing, bridging, grading and ditching as the old road; at

which time, and not before, the said new route will be established and located as a public highway, and thereafter kept in repair according to law."

At the September term, 1863, of the Board of Commissioners, Joseph W. Wilson, one of the original petitioners, filed a petition stating that the new road was fully completed according to the conditions in the previous order of the board, and praying that it be received, and for an order vacating so much of the old road as was changed by said order.

Whereupon, as we are informed by the record, "the board proceeded to said road and made a personal inspection thereof, and, after a careful examination of the same, agreed to review it in compliance with said condition," and then and there declared the same to be a public highway, "whenever it shall be opened the width required, and the said road is hereby ordered to be kept in repair as such from henceforward, and that the old road between the commencement and the termination of the change be vacated."

The remonstrants then moved the board to set aside the original petition, the report of the viewers and the order of the board establishing the change and vacating that part of the old road; but the motion was overruled, and they appealed to the Tipton Circuit Court.

The cause was afterward moved, by change of venue, to the Howard Circuit Court. In the circuit court the appellants moved to strike out the remonstrance, for the reason "that none of the persons signing the same resided along the proposed change, or the highway to be vacated." The motion was supported by affidavit, but the court overruled it. They then moved the court to dismiss the appeal, on the ground that it was not taken within thirty days next after the determination of said board locating and establishing the proposed change, but the court overruled the motion.

The cause was tried by a jury, who returned a verdict that the proposed change was not of public utility. Motion for a new trial overruled, aud judgment against appellants for costs.

The errors assigned are:

1. The court erred in overruling the appellant's motion to strike out the original remonstrance.

2. The court erred in overruling the appellant's motion to dismiss the appeal.

3. The verdict of the jury is contrary to law, as it is not upon the issue in the cause.

We will examine them in the order in which they are presented.

The first question is, did the court err in refusing to strike out the original remonstrance, on the alleged ground that none of the persons signing it "resided along the proposed change, or the highway to be vacated?" The statute upon which the remonstrance was filed provides that "if any one or more freeholders, residing in such county, along such proposed highway, vacation or change, shall object to the same at any time before final action thereon, as not being of public utility, other viewers may be appointed," &c. The remonstrance describes the persons signing it as "citizens of Cicero township in said county." This description does not conform to the language of the statute, and yet they may be freeholders, and some one or more of them reside along the proposed change or vacation, within the proper meaning of the statute, which we do not construe to mean that to enable a freeholder to object he must reside immediately on the

line of the proposed change or road to be vacated, but in its vicinity, or within such reasonable distance thereof that he may be affected by the change or vacation in his convenience of travel or otherwise. But the motion was properly overruled, for the reason that the objection, if otherwise properly made, came too late. No objection was interposed at the time the remonstrance was filed either by the appellants or the board of commissioners.

The latter recognized their right to object to the proposed change, and upon the filing of the remonstrance, appointed viewers to review it; upon their report, and the subsequent proceedings of the board thereon, the final order was made establishing the change, and it was too late to deny their right to make the objection on appeal in the circuit court. [See Little vs. Thompson *et al.*, ante p. 146.]

But it is urged that the court erred in overruling the appellant's motion to dismiss the appeal. We think otherwise.

It is admitted that the appeal was taken in less than thirty days after the order of the board, at the September term, 1863, establishing the change, declaring it a public highway, and vacating that part of the old road.

But the appellants insist that the report of the reviewers and the order of the board, at the June term, 1861, established the proposed change, and was final.

In this, we think, they are in error. That report and the order of the board upon it, we apprehend, are without precedent, and certainly without authority; but it was not final, nor does it purport to be so. It was the duty of the viewers to determine and report whether the proposed change was, or was not of public utility.

They do neither, but make a conditional report, that if the petitioners will open the new road, then they say the change is of public utility, but if they refuse to do so, then their report is that it is not of public utility. They were not authorized to annex such a condition, aad the petitioners were clearly not bound to comply with it, and unless they did comply, the report stood against the public utility of the change.

The change was not, therefore, authorized or established at that time. Nor, as we have already said, does the order of the board, made at that time, purport to establish the change. The language is that, when the new route is opened, and made as good as the old one, "the said new route *will be* established and located as a public highway." It is also evident that it was so understood, both by the appellants and the commissioners, and hence the petition at the September term, 1863, to have the new road received and established, and the old one vacated, and the order of the board, after a careful personal inspection, in conformity with the petition. The only remaining error assigned is, that the verdict of the jury is not upon the issue in the cause.

The only issue in the cause was made by the remonstrance, denying that the proposed change was of public utility.

That was the issue properly submitted to, and passed upon by the jury. There is nothing in the objection.

The judgment is affirmed, with costs.

In the case of Smith and others vs. Alexander and others, 24 Ind. 454, appeal from the Marion circuit court, Elliott, C. J., says:

William Alexander and twenty-nine others, citizens and freeholders of Marion

county, filed a petition before the board of county commissioners of said county, for the location of a public highway. Proof of notice of the petition by publication in a weekly newspaper published in the county, was made, and also that at least six of the petitioners were freeholders who resided in the immediate neighborhood of the road petitioned for. At the time the petition was filed, John W. Hamilton appeared as the attorney of Henry Smith and others, and filed written objections to the reception of the petition, on the grounds that a previous application had been made for the same proposed highway, and defeated, and that the petition is not signed by any of the owners of the lands on the line of the proposed highway. The objections were overruled, and viewers were appointed, who reported in favor of the proposed highway, and that it would be of "general utility."

Smith and others, over whose land the proposed highway, if located, would pass, then appeared and filed their written objections, or remonstrance, against the same, on account of the damages it would cause them, the amount of which to each is stated. Reviewers were thereupon appointed, and a final report was made, finding the proposed highway to be of public utility, and assessing damages in favor of a part of the objectors, and finding that the others would not be injured by the location of the highway.

A final order was thereupon made, locating and establishing the highway, and ordering it to be opened thirty feet in width.

The remonstrants thereupon appealed to the circuit court. David G. Cole, over whose lands the highway was proposed to be located, appeared in the circuit court, and on his petition being filed, claiming damages, was permitted to join in the remonstrance.

The case was then submitted to a jury, who found that the present highway was of public utility, and assessed damages in favor of a part of the claimants.

Motions for a new trial and in arrest of judgment were made and overruled, and a final judgment rendered, locating the highway. The remonstrants appeal.

The first objection presented, upon which a reversal is claimed, is that the description of the highway and its location, both in the reports of the viewers and the final order of the court, is defective for want of sufficient certainty.

The description as given in the petition is followed in all the subsequent proceedings, and is as follows: "Beginning at the line dividing sections eight and nine, in township fifteen, north of range four east, at a point where the Indianapolis and Bean Creek gravel road crosses said line, thence running north on said line," &c., "until said line will intersect the Indianapolis and Pendleton gravel road; varying, however, from said line at the crossing of the Central Railway track, far enough to the east to avoid the culvert under said railway track, and to place said highway upon good ground for a road. Said road will be about three miles in length."

The statute requires the viewers, in their report, to give a full description of the location by routes and bounds, and by its course and distance. This road being located on a section line, already definitely ascertained and marked, no further marking was necessary, even to a strict compliance with the statute, except, perhaps, at the point where it varies from that line far enough to avoid the culvert under the Central Railway track. The course and distance are stated.

We think it but reasonable to infer that the viewers marked the location, at

the point of deviation from the section line, though their report is silent upon that subject. At any rate, we do not think the location is void for uncertainty. But this question is not properly before us, as it is raised for the first time in the appellants' brief. It is not assigned as a cause for a new trial, nor in arrest of judgment, nor is it assigned as error.

The only remaining objection is, that the circuit court erred in refusing to dismiss the proceedings on the motion of Cole, for want of sufficient notice of the filing of the original petition before the board of commissioners. We do not decide that the notice was sufficient, nor discuss the question at all, for the reason that the objection, if otherwise valid, was not made at the proper time. The record shows that at the time the petition was presented, Smith, and others of the appellants, appeared and objected to the proceedings on other grounds, but made no objection to the sufficiency of the notice; and when the first viewers reported in favor of the highway, all the remonstrants, except Cole, appeared and filed their claims for damages.

They did not object to the sufficiency of the notice, nor that the proposed highway was not of public utility; they simply claimed damages because of its location on their lands. We deem it proper here to say that under the statute, it is clear that the reviewers had nothing to do with the question of the public utility of the highway; that fact was, in effect, admitted by the remonstrants failing to deny it, and claiming damages. The only question, therefore, submitted to the reviewers, was the amount of damages, if any, the remonstrants would sustain by reason of the location of the road through their lands.

This, in effect, was the issue, and was the only question to be tried, on appeal, in the circuit court. The remonstrants might also have put in issue the public utility of the highway, but they did not, and it was, therefore, admitted. Cole was not a party to the remonstrance when it was filed, but was permitted to become a party to it in the circuit court, and to file his claim for damages, which he did. He then occupied the same relation to the proceedings that the other claimants of damages did, and could not then object to the notice. See Dazzy et al. vs. Coats et al., 19 Ind. 259.

The judgment below is affirmed.

In the case of Hays and others v. Campbell and others, 17 Ind., 431, appeal from the Daviess circuit court, Hanna, J. says:

The appellants filed a petition before the board of county commissioners, asking that a county road be laid out and opened, "Commencing at the State road leading from Washington, Daviess county, Ind., to Bedford, Lawrence county, Ind., at sections 16 and 17, and running on the line between Barr and Washington townships, due south, or as nearly so as it can run to get a good road, to intersect the Alfordsville road." No remonstrance being filed, viewers were appointed, who reported that they had viewed the road "Commencing at sections 16 and 17, on," &c., and running on the line between Barr and Washington townships, due south to the line of the Cincinnati & St. Louis Railroad, thence west thirteen rods, thence south eighty rods, thence east thirteen rods, thence south to the south side of Aikman's Creek, thence south-west thirty rods to the Alfordsville road; and that the same would be of public utility. A remonstrance was then filed by the appellees, as the record states, demanding their

damages occasioned by the location, &c., of said road. Viewers were appointed, who reported that said remonstrants would sustain no damages.

The road was ordered to be opened. Appellees appealed to the circuit court, upon a bond signed by the surety only, and there moved to dismiss the proceedings for want of a sufficient petition and report of viewers.

Appellants in this court moved there to dismiss the appeal for want of a sufficient bond, and for want of an affidavit of interest in appellants; and also moved to strike out the names of the signers of the original petition as parties, they and the board of county commissioners being named as defendants in the appeal.

The court overruled all the motions of the present appellants, directed the appellants in that court to file a new bond, and then dismissed the whole proceedings at the costs of the petitioners; and refused judgment for said costs against the county board.

It is insisted that where there is no remonstrance filed to the original application for the appointment of viewers, &c., those persons who may come in and merely object to an order authorizing the opening of said road until their claim for damages is settled, cannot, on appeal, object to or raise the question as to the sufficiency of the original petition. That all they can do is to ask the court to determine in a proper manner the amount of damages to which they are entitled.

To this it is answered that, even if this position is true as to proceedings legally conducted, it cannot apply to those where the petition, &c., is so vague as to give the board of commissioners no jurisdiction; and that such is the character of this petition; that it does not, conformably to the statutory requirement, name the beginning, route and terminus of the intended road, and the persons through whose hands it will pass.

First. Could the court, under the circumstances, examine the sufficiency of the petition? We are of opinion that if the petition was so insufficient as to form no basis for the action of the board, that an objection thereto would be fatal at any stage of the proceedings. Whether it was thus invalid, depends upon the construction to be given to our statutes upon the subject of highways. 1 R. S., pp. 307–316. The first fourteen sections of said act are devoted to the mode of establishing, &c., highways that run through more than one county, and require that a petition for such road shall contain a description of the "beginning, course, and termination of the same, together with the names of the owners, or occupants, or agents of the lands through which the same may pass." The next twelve sections point out the mode of establishing, &c., roads running through but one county, but through more than one township.

These sections merely provide that a petition shall be presented to the board of commissioners of the county, &c., but do not specify what such petition shall contain. It is provided, though, that the report of the reviewers shall contain a full description, &c., of the road by "routes and bounds, courses and distances;" but even that report is not required to name the proprietors, &c., of lands through which such road is located.

Should these statutes be so construed as to require the petition, in the one case, to contain all that is required in the other? The reason, it appears to us, is as strong for requiring the petition to name the persons to be effected by such highway, where it passes through but one county, as where it passes through

more. We are, therefore, of the opinion that such should be the character of the petition. In the absence of this essential requisite of the petition in the case at bar, we are of opinion that the county board were not authorized to act upon the same.

One of the very objects to be accomplished by naming the proprietors of the lands was defeated, namely, that they should, by the notice to be given, based upon such petition, be prepared to remonstrate, if deemed expedient. It is now urged that because such remonstrance was not filed in the first instance, that the parties are precluded from taking advantage of defects in such original application.

As the whole proceeding had been thus built up on an insufficient and invalid foundation, the court did right to dismiss it, because at some future stage of its progress it might, perhaps, have involved persons in serious litigation in attempting to open and establish said road.

Per Curiam.—The judgment is affirmed, with costs.

In the case of Hughes v. Sellers and others, 34 Ind., 337, appealed from the Hendricks Circuit Court, Downey, J., says:

The appellees filed a petition before the Board of Commissioners as follows:

STATE OF INDIANA, }
County of Hendricks. } ss.

To the Board of Commissioners of Hendricks County:

The undersigned, residents of Hendricks county and freeholders therein, respectfully petition the honorable Board of Commissioners aforesaid for the location of a public highway in said county as follows: Commencing at the northeast corner of B. N. Moberly's land in section 30, township 16, north of range 1 east; thence running north between the lands of James Smith on the west, and the lands of Hiram Mitchell and A. F. Smith and Richard B. Jones on the east, to the northeast corner of James Smith's land; thence west eleven rods; thence north between the lands of E. D. Sellers and the heirs of Jeremiah Depew to the northeast corner of said heirs's land; thence west two rods; thence north between the land of Henry Hughes' heirs to intersect the Danville and Brownsburg road. Said road being a public necessity and of public utility, as your petitioners believe. (Signed by twelve persons.)

Upon proof of notice, viewers were appointed, who subsequently reported that they had viewed the said described highway as follows, to wit: Giving the same description as the petition, "and are of the opinion that the location of said described highway would be of public utility."

There was a motion made by the appellant to set aside this report, which was overruled. Upon remonstrance by her, other viewers were appointed, who reported in favor of the utility of the highway, and that they had *laid it out thirty feet wide*, describing it as in the petition.

The appellant then remonstrated, claiming damages, and reviewers were appointed, fixing the amount of her damages. The damages having been paid to the county treasurer, the Commissioners ordered the highway opened.

The appellant appealed to the circuit court, where she moved to dismiss the petition, because it did not sufficiently fix the beginning and termination of the proposed highway. This was overruled. The appellant then presented the

same objection to the first report that was made before the commissioners, for the reasons, among others, that the said viewers were not sworn, and did not lay out and mark the proposed highway; but the court refused to entertain and consider the said objection. The court, having heard the evidence, found that the proposed highway sought to be established and located by the petitioners would be of public utility, and re-assessed the damages, and found that they had been deposited with the treasurer for the defendant.

There was a motion for a new trial, for the reasons, first, that the court improperly overruled the motion of the defendant to dismiss the plaintiffs' petition for a highway; second, the court improperly refused to entertain and consider the original objection in writing made by the defendant to the board of commissioners receiving and acting on the report of the first set of viewers, and to strike out said report.

This motion was overruled. The defendant then moved in arrest of judgment, because, first, the petition for the highway was not sufficient in law to form the basis of action of the board of commissioners; second, because the petition was not sufficient in law for that court to render a valid judgment on establishing and creating a public highway; third, because the report of the first viewers was not sufficient in law on which to render a valid judgment establishing a highway on the route set forth in said report, on which route the court had found a highway would be of public utility.

This motion was also overruled by the court, and judgment was rendered that the highway be laid out thirty feet wide, on the route as described in the petition, &c. To all these rulings of the court exceptions were duly taken by the defendant.

The errors assigned are: 1st, the refusal of a new trial; 2d, refusing to arrest the judgment; 3d, rendering judgment against the defendant without appointing a guardian *ad litem* for her.

The first question presented, in the natural order, for our consideration, is as to the sufficiency of the petition, as that is at the foundation of the proceeding. The termini of the proposed highway are not very well fixed; but there is, we think, another and, perhaps, more serious objection to the petition, which is that it does not give the names of the owners, occupants, or agents of the lands through which the highway passes, as required by 1 G. & H., p. 359, § 1.

Literally construed, the petition proposes to do an impossible thing, that is, lay out a highway between the lands of two adjoining proprietors. We must understand it as proposing to run the highway through the lands of the persons named, but on the line dividing their lands, so that, according to the statute, each shall give half of the road. 1 G. & H., p. 363, § 16. It should then have given the names of these owners; and it is not giving the names of owners to say that they are the heirs of a designated person, as is done with two or more of the tracts of land over which this highway is to run.

This objection was not waived because it was not made before the board of commissioners. "We are of opinion that if the petition was so insufficient as to form no basis for the action of the board, an objection thereto would be fatal at any stage of the proceedings." Hays v. Campbell, 17 Ind. 430. We know of no other standard by which to measure the sufficiency of the petition than that

which is to be found in the statute providing what it shall contain. 1 G. & H., p. 359, § 1; Hays v. Campbell, *supra*.

Though it may be unnecessary, we will say that we think the report of the first viewers was defective and insufficient, because it did not show that they had laid out and marked the highway, nor that they had laid it out so that each adjoining owner should give half of the road, as required by 1 G. & H., p. 363, § 16.

We also think that the second viewers appointed had no authority to lay out and mark the highway. Their duty was simply to examine the proposed highway and report whether or not it would be of public utility. 1 G. & H., p. 364, § 23.

The highway having never been properly laid out and marked by the viewers, we do not see how the circuit court could adjudge it to be opened and established as such.

There is nothing in the last error assigned. The appellant was represented by her guardian before the commissioners and in the circuit court.

It is a part of the duties of the guardian to appear and defend, or cause to be defended, all suits against his ward. 2 G. & H. 567, sec. 9, Fifth Division. Where the guardian appears, it is necessary for the court to appoint a guardian *ad litem*.

The judgment is reversed, with costs, and the cause remanded, with directions to the circuit court to sustain the motion in arrest of judgment.

In the case of Sidener v. Essex et al., 22 Ind. 201, appeal from the Bartholomew Circuit Court, Davison, J., says:

Thomas Essex and others, to the number of eighteen, at the September term, 1859, filed their petition before the Board of Commissioners of Bartholomew county for the location of a public highway. The petition describes the proposed highway, names the owners of the land through which it will run, and prays the appointment of viewers, &c. The board, in accordance with the prayer, appointed three viewers, who, at the March term, 1860, reported that they had viewed, laid out, and marked the proposed highway, and that the same, when opened, would be of public utility.

At the last named term, Joseph D. Sidener remonstrated against the opening of the highway, alleging in his remonstrance that the same, if opened, will run through his land, will damage him five hundred dollars, and will not be of public utility, and therefore he prays the appointment of reviewers.

And thereupon the board appointed three reviewers, who, at the September term, 1860, reported that the contemplated highway, if established, will be of public utility, and that Sidener, by reason of its passage through his land, will sustain damages to the amount of twenty-five dollars.

Upon the filing of this report, the board made an order directing the proposed highway to be opened to the width of thirty feet, and be kept in repair as other roads; provided the petitioners herein shall pay Sidener, the remonstrant, twenty-five dollars, the damages assessed in his favor, &c. From this decision Sidener appealed. In the circuit court, the cause having been referred to a jury, the parties, by agreement in writing, submitted for the consideration of the jury the following: "1. Would the proposed highway be of public utility? 2. If of public utility, would it be of any damage to Sidener, and if so, what amount?"

To these questions the jury responded, that "the proposed highway would be of public utility," and that Sidener would, if the road was opened, be damaged twenty-five dollars. The court, having a new trial, ordered that the sum of

twenty-five dollars, found in favor of Sidener as damages, be paid out of the county treasury, and that the highway, as described in the petition, be opened and kept in repair as a public highway, &c.

The errors assigned are in substance as follows:

1. The court erred in its refusal of evidence offered by defendant.
2. The verdict is unsustained by the evidence.
3. The width of the road is not specified in the order of the court.

The plaintiff, upon the trial, offered to prove that the original petition was not signed by twelve freeholders; but the court refused the offer, and he excepted.

There is nothing in this exception. As we have seen, the only question presented by the remonstrance and submitted to the jury, related to the utility of the road and the question of damages. It follows, then, the proposed evidence was not pertinent to the issues, and, therefore, inadmissible. Kemp v. Smith, 7 Ind. 471.

The plaintiff, in his own behalf, testified that the contemplated highway would run through his farm from east to west, on the line between two sections, and through a lane which is closed up at each end; that the portion of his farm on the north side of the lane was fenced off into fields running north and south; that in the north-west corner of the farm there is a spring of unfailing water for stock, and that he had his fields so arranged that he could turn his stock from any field into the lane, from whence the stock could go to the water; that on the south side of the farm there is a small branch, but it is always dry during the dry seasons of the year, and he watered his stock on that part of the farm by turning them into the lane; that there was no stock water on the farm other than the above; and that he had arranged his farm in part for a stock farm, and dealt considerably in stock.

Having thus testified, the plaintiff proposed to prove the difference between the market value of the farm, if any, as a stock farm, in its present condition, and what it would be with the proposed highway running through it. The court refused the evidence, but allowed "the plaintiff to prove the difference in the market value of the farm as it now is, and what it would be if the highway was opened."

We perceive nothing in these rulings of which the plaintiff has a right to complain. The market value of the farm was its real value; and if, by reason of the location of the highway, that value would be diminished, the amount of such diminution would be the true measure of damages. But the final order of the court is plainly defective, because it fails to specify the width of the road. Of this, however, the appellant has no right to complain. The defectiveness of the order, in that respect, in no way conflicted with his rights; nor does it appear that such defect was pointed out to the lower court.

In looking into the whole record, we perceive no error which authorizes a reversal; the judgment will therefore be affirmed, with directions to the circuit court to correct its order, by specifying the width of the road.

Per Curium.—The judgment is affirmed accordingly, and remanded for the correction of said order, with costs.

12. By statute, user of a highway for twenty years is an absolute bar; but a highway may be established by user for a shorter period. Hays vs. The State, 8 Ind. 425. See The State vs. Hill, 10 Ind. 219. See Easement.

13. A road which has been used by the public uninterruptedly for twenty

years, becomes a puhlic highway; and its width, as used at the end of that time, is the established width of the road. Hart vs. Trustees, &c., 15 Ind. 226; Epler vs. Newman, 5 Ind. 559.

17. A petition, under the act of 1849, to the board of commissioners for the location of a highway, stated the names of the owners of the lands through which the contemplated highway would pass, but did not state who occupied them. *Held*, that the omission was an immaterial one. *Held*, also, that it could not affect the jurisdiction of the board. Mulhollin vs. Thomas, 7 Ind. 165.

18. The general highway act of 1849 gave to the boards of commissioners jurisdiction of the opening of highways, and also gave an appeal from their decisions to the circuit court. Mulhollin vs. Thomas, 7 Ind. 165.

19. Where the proceedings for opening a highway show the terminus thereof, and that its course is to follow that of the Ohio river: *Held*, that the beginning, course, and termination of the road are sufficiently shown within the intention of section 2, p. 446, R. S. 1831. Hays vs. The State, 8 Ind. 425.

20. *Order of Location.*—Where a road was, by order of the proper authority, located on a line between two farms, so far as such order could make a location, but was, in point of fact, opened, marked, and used for twenty-seven years on one side of that line, wholly on the land of one of the proprietors: *Held*, in a prosecution for malicious trespass, that the original order would not, at that length of time after it was made, confer upon the supervision the authority, under our statutes, to open the road upon the line. Lemasters vs. The State, Ind. 391.

21. Under the statute of 1839 (Act, p. 105, § 30), an order by a county board authorizing the opening of a private way, without defining its width, is void on its face. Barnard vs. Hayworth, 9 Ind. 103; Coulton vs. The State, 9 Blackf. 208; White vs. Conover, 5 Ind. 462.

22. On the hearing of an application to change a county road, there must be proof that legal notice of it had been given, or the application may be dismissed. Peabody vs. Sweet, 3 Ind. 514.

23. Unless such proof be waived by the party objecting. Mulhollin vs. Thomas, 7 Ind. 165.

24. *Viewers.*—The highway act of 1849 required that the persons to be appointed as viewers for a proposed highway, should be disinterested freeholders. *Held*, that a person who had signed a petition for the road, was not a disinterested freeholder, and that in a suit for obstructing the road, an objebtion that one of the viewers was a petitioner, was fatal. Epler vs. Newman, 5 Ind. 459.

25. A report made by viewers of a proposed highway, who own land along the same, is a nullity. Daggy vs. Green, 12 Ind. 303.

26. A change in a part of the Terre Haute State road was made and marked by a commissioner, under the act of 1833. *Held*, that the part of the road as thus changed might be opened, though the commissioner's report had not been filed in the clerk's office, as the act requires. White vs. Morris, 4 Blackf. 2.

27. In opening a road established by the county commissioners, the supervisor cannot deviate from the course of the road so established. Phipps vs. The State, 7 Blackf. 512.

28. A county board, in establishing a way, must follow the directions of the statute. Barnard vs. Haworth, 9 Ind. 103.

29. *Vacation.* Section 54, p. 332, R. S., 1843, which provided that every

highway already laid out, or which might thereafter be laid out, which should not be opened, &c., within six years, &c., should cease to be a highway, &c., did not apply to streets and alleys of towns and cities. The Common Council, &c., vs. Croas. 7 Ind. 9; Sec. 1 R. S., 1852, p. 307. See Haynes vs. Thomas, 7 Ind. 38. See 8 Ind. 378.

30. Under the Constitution of 1816, the legislature had power to vacate roads, streets, &c., and of the propriety of their doing so, they were the exclusive judges so far as their acts might affect the citizens of the State at large; but they had no such power where their action would take away a private right. Haynes vs. Thomas, 7 Ind. 38. See Constitutional law.

31. That an appeal lies from the order of county board vacating a public highway. See appeal, p. 28. Sheppard vs. Dodd, 15 Ind. 217; Moore vs. Smock, 6 Ind. 392.

32. The affidavit for an appeal cannot be supplied in the circuit court. Slayton vs. Hulings, 7 Ind. 144.

33. Upon appeal from an order of a county board for the payment of the damages assessed by reviewers, of a highway, together with the costs out of the county treasury, the board is a proper party, and, as such, must be governed by the rules of practice that obtain as to other parties. The Board, &c., vs. Hedges, 11 Ind. 291.

34. In a proceeding before the board of commissioners to locate a highway, after a report that the road would be of public utility, A made his claim for damages in consequence of the highway being located through his land. Assessors were thereupon appointed, who reported that A would sustain no damages, and the road was ordered to be opened. *Held*, that on appeal to the circuit court, viewers could not again be appointed to assess A's damages. Kemp vs. Smith, 7 Ind. 471. See Washington Township vs. Butler, 13 Ind. 396. See Assessment of Damages.

Rights of Proprietors along the Lines of Highways.

35. *In the Soil.*—If land over which a highway passes has been seized and appropriated to that purpose by the right of eminent domain, the freehold still technically remains in the owner of the soil. Vaughn vs. Stuzaker, 16 Ind. 338; 12 Ind. 374. See Covenant Deed.

36. Where the owner of land, by deed conveys a part thereof to another, to be used and occupied as a street, together with the reversion and remainder, and all the estate, right, title, &c., of such owner in and to the same, no interest is left in such owner that can be sold and conveyed by him. Vaughn vs. Stuzaker, 16 Ind. 338.

37. The right to use and enjoy a street is an appurtenance to a lot abutting upon a street, and an injury to the appurtenance is an injury to the whole property. Protzman vs. The Indianapolis, &c., Railroad Co., 9 Ind. 467.

Notice of Petition.

29. Proof of the posting up of the notice of a petition for the location of a highway, may be made before the board of commisstoners by affidavit, and the same made of proof is admissible on appeal. Wright vs. Wells et al., 29 Ind. 354.

21. *Same.*—The sufficiency of such proof is a judisdictional fact, which

must be determined by the board before the appointment of viewers. After the board has taken jurisdiction, objection to such proof comes too late. *Ib.*

27. If the public utility of a proposed highway is not put in issue by the remonstrance, but a claim for damages only is presented, the utility of the highway is admitted, and the reviewers have only to report upon the claim for damages. Smith et al. v. Alexander et al., 24 Ind. 454.

50. On an appeal from the county board to the circuit court in a proceeding for the location of a highway, the circuit court does not take jurisdiction for the correction of errors, but must try the cause as an original cause, and make a final judgment. The court may execute its own judgment, or send the case down to the county board with directions to excute the judgment. McPherson v. Leathers, 29 Ind. 65.

51. In applications for the location or change of public highways, pending in the common pleas or circuit court on appeal from the board of county commissioners, all errors not properly presented to the court of commissioners will be considered by the appellate court to have been waived. Shafer et al. v. Bardener et al., 19 Ind. 294.

52, Where viewers report that a proposed location or change of a public highway will not be of public utility, it is not competent for the appellate or inferior court to order such change or location to be made. *Ib.*

53. *Practice.*—In an appeal to the circuit court from the judgment of the board of commissioners, in an application for the location of a highway, all the original papers in the application before the commissioners should be sent to the circuit court, or the latter will have no authority to try the cause. Purviance et al. v. Drover et al., 20 Ind. 238.

54. *Location of.—Appeal Bond.*—A bond signed by the appellants only is not a bond with surety, as required by the statute allowing an appeal from the decision of the board of county commissioners in a proceeding for the location of a highway (1 G. & H., 364, sec. 26), nor can the defect be cured by filing a proper bond in the appellate court. McVey et al. v. Heavenridge et al., 30 Ind. 100.

55. *Practice.*—Where a remonstrance against the location, change, or vacation of a highway has been received and acted upon by the board of commissioners without objection, it is too late, after the case has been taken by appeal to the circuit court, to object that the remonstrants were not persons residing along the proposed highway. Wilson et al. v. Whitset et al. 24 Ind. 306.

56. *Parties.*—The board of county commissioners is not a necessary party to an appeal from an order of the board establishing a highway. Wright et al v. Wells, 27 Ind. 65. See *Appeal.*

Rights of Proprietors along the lines of Highways.

57. That the constitutional provision, which provides that the right of trial by jury shall remain inviolate, does not extend to proceedings for the assessment of damages in the location of highways. See Hines v. Aydelott, 26 Ind. 431.

58. *Grant.*—Where one owning lands along the line of a contemplated gravel road executed with others a writing giving to the gravel road company the right to enter upon his lands and remove gravel, etc., tor the purpose of constructing the road, it was held a grant, and not a license which could be re-

voked at the pleasure of the party giving it. Bracken v. The Rushville, etc., Gravel Road Company, 27 Ind. 346.

59. By the location of a way over the lands of any person, the public have acquired an easement which the owner of the land cannot lawfully extinguish or unreasonably interrupt. But the soil and the freehold remain in the owner, although incumbered with a way. And every use to which the land may be applied, and all the profits which may be derived from it consistently with the continuance of the easement, the owner can lawfully claim. See Edgerton et al. v. Huff, 26 Ind. 35; See Eminent Domain; Easements.

60. *Measure of Damages.*—Where land is alleged to be injured by the location and opening of a highway through it, the measure of damages will be the difference between its market value at the time with the highway, and its market value without the highway. Sidener vs. Essex, 22 Ind. 201. See Damages.

61. That an injunction will lie to prevent the removal of fences for the purpose of opening a highway under a void order of the county commissioners. See Lewis et al. v. Rough, 26 Ind. 398; *id.* 53; 23 *id.* 623. See *Injunctions.*

42. *Remonstrance.*—It is not necessary, under our statute, that the persons remonstrating against the location, vacation, or change of a highway, should reside immediately on the line of the highway to be located, vacated or changed, but it is enough if they reside in the vicinity, or within such reasonable distance thereof, that they would be affected thereby in their convenience of travel or otherwise. Wilson et al. v. Whitsell et al., 24 Ind. 306.

2. Deviation from the original track is upon an alleged prescriptive right. Travel may slightly deviate from the thread of a road which is being used to avoid an obstruction, and still not change the road itself. But it is otherwise where the whole length of the road is abandoned for eight or nine years, and is not sufficiently traveled to prevent its becoming obstructed by the growth of weeds and brush. In such case there is not that continued user which is absolutely necessary to establish a prescriptive right. Gentleman v. Soule, 32 Ills. 271.

3. Twenty years is the shortest time within which the public can acquire a prescriptive right to use a road. *Ibid.*

4. Nor can the time during which various and distinct lines of travel have been used, be so united as to make up the requisite time to establish a prescriptive right to any given single line of road. *Ibid.*

5. In this case it was held that the mere survey and platting of a road by a county surveyor, under the direction of highway commissioners, did not have the effect to establish it as a public highway, it having been designed only to ascertain the courses and distances of a road claimed to be already established, and leaving the proof of its existence precisely as it was before. Such proceeding had, however, the effect to estop the public from claiming that the road ran upon a different line from the survey. *Ibid.*

6. The survey and plat of a public road is evidence of its location but is not conclusive; but like the field notes of the government surveys, parol evidence may be received to show that the road was actually different from the calls in the survey of the road. Hiner v. The People, 34 Ills. 297.

7. *Vacation of.—Located by Township Authorities.*—A public road, located by highway commissioners, must be opened in five years, or the right of way

will revert to the owner of the land, and the road become vacated. To avoid the vacation of a road thus laid out and located, it is necessary that it should be opened its entire length within five years. It is not sufficient to open only a part of such road. Green v. Green, 34 Ills. 320.

11. For a case where it was held that, in an order establishing a road, the description of a route was sufficiently certain. Clifford v. The Town of Eagle, 35 Ills. 444.

12. *Laying out a Road.*—For a case where the proceedings for laying out and establishing a road are set forth and commented upon in a suit for obstructing the same. *Ibid.*

13. *Description of Route.*—Although a road cannot be located from a mere reference to the calls and distances given in the order establishing it, yet if the court can be satisfied on calling surveyors and receiving proofs on the points of location that the road can be located as laid out, the order laying out the road will be sufficient. Commissioners of Highways v. The People, 38 Ills. 348.

14, *How acquired by the Public.*—A public highway may be acquired by condemnation, under the statute, by grant from the owner, and by dedication to and acceptance by the public, which may be inferred from travel by the public and repairs by the proper pubiic authorities. Grube vs. Nichols, 36 Ills. 93.

20. *Abandonment.*—Where it appears that the public have ceased to travel a road, and have acquired another which accommodates public travel, a jury would be warranted in presuming an abandonment of the first road. And it is error to instruct the jury that the new road must accommodate the public equally as well as the former road. Grube vs. Nichols, 36 Ill. 92.

3. If a road is used and traveled by the public as a highway, and is recognized and kept in repair as such by the county commissioners and supervisor, proof of these facts furnishes a legal presumption, liable to be rebutted, that such road is a public highway. Egman vs. The People, 1 Giles, 4; Nesley vs. Brown, 1 Giles, 10.

4. *Proof of.*—It is not necessary to produce record evidence of a road. *Ibid.*

5. Parol evidence is admissible to show where a road is located. *Ibid.*

7. *How Established.*—A highway may be established and proved by prescription, by dedication, and by laying out the same as directed by statute. Alvord vs. Ashley, 17 Ills. 363.

9. *By Prescription.*—A continuous and uninterrupted use of a highway by the public for more than twenty years, creates a prescriptive right to the use of the road. And this right continues until it is clearly and unmistakably abandoned. Town of Lewiston vs. Proctor, 27 Ills. 414.

15. Commissioners appointed to assess the damages a party may sustain by the opening of a road across his premises, have not authority to make an agreement in relation thereto; and any such unexecuted agreement may be revoked. Kimball vs. Yates, 14 Ills. 464.

17. An overseer of highways, in order to justify for opening a road, under an order of the commissioners of highways, must show that a case existed which justified the order issued by them. Guptail vs. Yeft, 16 Ills. 365.

18. *Notice.*—Supervisors, in the matter of opening a road, when they dismiss and adjourn, without any intention of further action, cannot resume the subject, unless notice of the time and place of a future meeting be served on the com-

missioners of highways, and on the three petitioners before served. Without this notice, the action of the supervisors is void. Keech vs. The People, 22 Ills. 478.

22. The laying out and opening of roads is not an exercise of judicial powers; but the presumption is, that the antecedent proceedings have been regular; which presumption, however, is subject to be rebutted. Nealy vs. Brown, 1 Gilm. 10.

24. A road is to be considered as established, and, in contemplation of law, opened, when the proper court have approved of the report of the viewers, and sanctioned the location. Ferris vs. Ward, 4 Gilm. 400.

25. A claim of damages, occasioned by the location of a public road, is not to be presumed, but must be expressly made, and at the proper time, so that, if the State or county thinks the payment of damages too great a sacrifice for the benefits to be obtained by having a road, it may abandon the project, or locate it elsewhere. *Ibid;* County of Sangamon vs. Brown, 13 Ills. 207.

26. *Practice.*—For a full discussion of the practice in the county and circuit courts in the matter of proceeding to claim damages for the laying a road over the claimants'; and the questions to be decided in said courts, and the right to, and who may appeal, and how, from the county court to the circuit court, see County of Sangamon vs. Brown, 13 Ills. 207.

32. A highway may be legally laid out and established by public use, and recognition of it by the proper authorities, and by acquiesence. Dimon v. The People, 17 Ills. 416; Daniels vs. The People, 21 Ills. 439.

34. *Abandonment.—Vacating of.*—If the public is to be charged with the abandonment of a road, the proof of the fact must be accompanied by the further proof that another road has been adopted in its stead. A public road, established by public authority, continues as such until it shall be vacated by a like authority. Champlin vs. Morgan, 20 Ills. 181; Town of Lewiston vs. Proctor, 27 Ills. 414.

44. After the owner of land has accepted the damages allowed for opening a highway, it is too late for him or his grantee to declare the proceedings for opening it void. Town vs. Town of Blackberry, 29 Ills. 137.

38. *Inclosures.*—If the viewers appointed to lay out a highway find an "inclosure" on the route petitioned for, the owner of which will not consent that the road shall be located through it, and they ascertain that a good route for a road can be otherwise had, they cannot locate the road through such inclosure, nor can they locate it upon such other route, if such other route would be an essential departure from the route mentioned in the petition. Holcraft vs. King et al., 25 Ind. 352.

39. *Same.*—When the report of the viewers is silent concerning such an inclosure, it will be presumed that there is none, or that the owner has given the consent required. *Ibid.*

42. *Remonstrance.*—It is not necessary, under our statute, that the persons remonstrating against the location, vacation, or change of a highway, should reside immediately on the line of the highway to be located, vacated, or changed, but it is enough if they reside in the vicinity, or within such reasonable distance thereof that they would be affected thereby in their convenience of travel or otherwise. Wilson et al. v. Whitsell et al., 24 Ind. 306.

CHAPTER XI.

AN ACT to authorize aid to the construction of railroads by counties and townships taking stock in, and making donations to railroad companies.

[APPROVED MAY 12, 1869.]

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That whenever a petition shall be presented to the Board of Commissioners of any county in this State, at any regular or special session thereof, signed by one hundred or more freeholders of said county, asking said board to make an appropriation of money to aid a railroad company, named in such petition, then duly organized under the laws of this State in the construction of a railroad in or through such county, or whenever such a petition shall be presented to such Board of Commissioners as aforesaid, signed by twenty-five freeholders of any township of such county, asking such township to make an appropriation of money to aid a railroad company named in such petition, and duly organized as aforesaid, in constructing a railroad in or through such township, by taking stock in or donating money to such company to an amount specified in such petition, not exceeding, however, two per centum upon the amount of the taxable property of such county or township, as the case may be, on the tax duplicate of the county, delivered to the treasurer of the county for the preceding year, it shall be the duty of such Board of Commissioners, after being satisfied that such petition has been properly signed by the requisite number of freeholders of such county or township, as aforesaid, to cause the same to be entered at full length upon their records.

SEC. 2. The Board of Commissioners shall take said petition under advisement and thereupon order the polls at the several voting places of the county, or of the particular township, as the case may be, to be opened on a day to be named in the order, which shall not be less than thirty nor

more than sixty days thereafter, and the votes of the legal voters of said county, or of the particular township named in said petition, to be taken upon the subject of appropriating money by such county or by such township, for the purpose of aiding in the construction of such railroad as prayed for in said petition. The judges and inspectors of elections shall be governed in the reception of votes by the laws then in force regulating general elections. No special registry shall be required as preliminary to the elections prescribed by this act, but the last preceding registry shall govern.

SEC. 3. The Auditor of such county shall immediately give notice, to be published for at least four weeks successively in some newspaper of general circulation in the county, or, if none be published therein, in some newspaper most convenient thereto, and by printed handbills, to be posted in three public places in each township of the county where a county appropriation is prayed for, or in ten public places in the particular township where a township appropriation is prayed for in the petition. Said handbills shall be posted by the sheriff of the county, three weeks prior to the day fixed for taking the vote of the county or of the particular township named in said petition, as the case may be, and the same, as well as said newspaper publication, shall notify the qualified voters of the county or of the particular township, as the case may be, that the polls will be opened on the day fixed by order of the Board of Commissioners, at the several voting places in the county, or in the township, as the case may be, to take the votes of the legal voters thereof upon the subject of such county or township aiding in the construction of the railroad named in such petition, to an amount to be specified in such notice; and the Auditor of the county shall make his official certificate that the said notice was published, and said Sheriff shall make his like certificate that said handbills were posted as required by this act, which certificates shall be entered upon the records of the Board of Commissioners, and shall be sufficient of the facts therein stated.

SEC. 4. The polls shall be opened at the several voting

places in the county, or township, as the case may be, by the proper judges and inspectors of election on the day fixed by said commissioners, and the boards shall be organized and poll books and tally sheets shall be kept, and the whole voting and taking and certifying of votes shall be conducted as nearly as may be in the manner provided by law for conducting the voting and certifying the votes at the general election for State and county officers.

SEC. 5. The qualifications of voters, to vote at the polls to be opened as required by this act, shall be ascertained, and challenges shall be allowed, in the same manner as is now or may be provided by law for ascertaining the qualifications of voters and making challenges at general elections.

SEC. 6. The ballots used at such voting as provided for in this act, shall be written or printed, and those cast for the appropriation by the county or township, as the case may be, to aid such railroad company, shall contain the words, "For the Railroad Appropriation," and those cast against it shall contain the words "Against the Railroad Appropriation;" and if two or more ballots shall be found purposely folded together they shall be rejected.

SEC. 7. When the ballots shall be counted the Board of Judges shall make out a certificate under their hands stating in words the number of votes given for the appropriation to the railroad company, and the number given against such appropriation, and such certificate, together with one of the lists of voters or poll books, and one of the tally sheets, shall be deposited with the inspector or with one of the judges selected by the Board of Judges.

SEC. 8. The inspector of each township or precinct, or judge of election, to whom such certificate, poll book and tally sheets shall have been delivered, shall, when the question is as to an appropriation by the entire county, constitute a Board of Canvassers who shall canvass and estimate the certificates, poll books and tally sheets returned by each member of said board, for which purpose they shall assemble at the court house on the Thursday next succeeding the day of such voting, between the hours of ten o'clock, A.

M., and six o'clock, P. M., but when the question is to an appropriation by a particular township, having more than one election precinct, the inspector of each precinct, or the judge of election to whom such certificate, poll book and tally sheets shall have been delivered shall constitute such Board of Canvassers, and shall meet at the time and place aforesaid, and perform the duties aforesaid; if, however, such township shall have but one election precinct, then the inspector and judges thereof, or any two of them, shall constitute the Board of Canvassers, and shall meet at the time and place aforesaid, and perform the duties aforesaid.

SEC. 9. The members of the board who shall assemble at such time and place, shall select one of their number chairman, and the Auditor shall act as their clerk.

SEC. 10. Such board, when organized, shall carefully compare and examine the papers, and shall prepare and sign a statement of the whole number of votes cast, and the number for such appropriation to the railroad company and the number against it.

SEC. 11. The statement of such vote, as provided in the preceding section, shall be filed with the said Auditor, who shall record the same at full length in the records of the Board of Commissioners of said county, and carefully file away and preserve the certificates, poll books and tally sheets aforesaid.

SEC. 12. If a majority of the votes cast shall be in favor of such railroad appropriation, the Board of County Commissioners, at their ensuing regular June session, shall grant the prayer of said petition, and shall levy a special tax of at least one-half the amount specified in said petition, but not exceeding one *per centum* upon the real and personal property in the county or township, as the case may be, liable to taxation for State and county purposes, which tax shall be collected in all respects as other taxes are collected for State and county purposes; and if the sum so levied shall not be equal to the amount specified in said petition, then the residue thereof shall be levied by said Board of County Commissioners at the June session of the following year.

SEC. 13. No county or township shall be authorized by the provisions of this act to appropriate to railroad purposes, or to raise by taxation for such purposes, to exceed two *per centum* upon the taxables of such county or township (as said taxables shall appear on the tax duplicate of the county), in any one period of two years.

SEC. 14. Said Board of Commissioners may, after the assessment herein provided for, or any part thereof, shall have been collected, take stock in said railroad company, from time to time, in the name of the proper county or township, as the case may be, and pay therefor, when the same is taken, out of the moneys so collected as aforesaid, or they may donate such moneys to said company for the purpose of aiding in the construction of such railroad, and pay the same over, from time to time, as the work progresses, as hereinafter provided.

SEC. 15. If, after the special tax shall have been levied, as provided for in the twelfth section of this act, and before it has been collected, the railroad company shall have so far completed the road to be aided as to be entitled to receive the money which the Board of Commissioners are authorized to donate, the same may be paid on the order of the board out of any moneys in the county treasury not otherwise appropriated, to be refunded to the county when such special tax shall have been collected.

SEC. 16. No donations of money shall be made to any railroad company by such Board of County Commissioners until the railroad to be constructed shall have been permanently located and work thereon done and paid for by the company equal to the amount of the donation then made; nor shall to exceed fifty *per cent.* of the money voted to be appropriated to such railroad company be donated and paid over to the company until the iron is laid upon the road and a train of cars shall have passed over the entire length thereof in such county or township, as the case may be.

SEC. 17. After the money authorized by this act to be appropriated shall have been levied and collected as aforesaid, and the subscription shall have been made on behalf of the county or township, as the case may be, the railroad

company, for whose aid the same shall have been so levied and collected, having fully constructed the railroad contemplated in said petition, so that trains of cars shall pass over the same, shall have the right to demand and have said money paid over according to the intent and meaning of this act; and any one of said petitioners, or any tax payer of the county or township, as the case may be, may compel the same to be done by mandate against the County Commissioners.

SEC. 18. A failure on the part of the railroad company to commence work upon the railroad in said county within one year from the levying of such special tax, or failure to complete such railroad ready for use within three years from such levying, shall forfeit the rights of such company to such donation, unless the County Commissioners, for good cause shown, shall give not to exceed one year's further time in which to complete the same, and the money raised by said special tax shall go into the general funds of the county or township, as the case may be, and be used accordingly.

SEC. 19. The officers conducting the elections, provided in this act, shall be allowed the same pay as is allowed for like services in case of a general election. Should the election result in favor of a railroad appropriation, the expenses of the election, after being paid by the county or township, as the case may be, shall be charged against the railroad company benefited, and deducted out of the first moneys collected by virtue of the appropriation.

SEC. 20. Inasmuch as an emergency exists for the immediate taking effect of this act, it is therefore declared that this act shall take effect and be in force from and after its passage.

"There is nothing that so generally excites the imagination and engages the affection of mankind as the right of property." There is a general feeling that pervades the human breast, and which seems to be interwoven into the very tissues of our nature, that tells us that we have the exclusive right to the earning of our hands. Prompted by these feelings, and being aware of the importance of prop-

erty to our earthly enjoyment, any encroachment upon these rights awakens in us the deepest solicitude, anxiety and care. And for the protection in and enjoyment of these rights man is ready to sacrifice his all; and it is only by his consent, either expressed or implied, that he will suffer himself to be disturbed in the enjoyment of this sacred right. At an early age in the history of society this right was fully appreciated and understood, and hence the rules of the common law, that seems to have been dictated by the feelings of natural justice and right that arise spontaneously in the human breast, inflict the most rigid punishment upon the individual who encroaches upon this right. This right being held in such esteem, and being so highly appreciated by mankind, the legislative authority of this country acting in accordance with the feeling and sentiments of the entire people, have thrown around each citizen of this great Republic the strong arm of a well regulated municipal law, to uphold and protect him in the enjoyment of these rights. But it would be hazardous to intrust such rights to the will and caprice of a few chosen representatives. The people have therefore taken the matter in hand, and have planted around themselves an impregnable wall of protection in the shape of constitutional law, that guides and controls the action of the law-making power. Hence we find incorporated in the Constitution of the United States, and in the constitution of almost every State in the Union, this provision: "The right of the people to be secure in their person, houses, papers and effects against unreasonable searches and seizures shall not be violated."(*m*)

But as a certain amount of money is absolutely necessary, for to carry on the affairs of the government, and as each citizen is equally protected in the enjoyment of his natural rights, each should be compelled to bear the proportional part of the necessary expense. But as men would differ in the amount they ought to furnish for the benefit of the whole, the power to regulate and settle this

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(*m*) 1 G. & H., p. 22, sec. 4 Constitutional Amendment.

point must be lodged by the people with some person or persons, and under our State constitution this power is given to the General Assembly. The constitution provides "That the General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal," &c. This power being lodged in the General Assembly, it must provide by law for a uniform mode of taxation; and it must do this in the way prescribed in the constitution, or the act will be void. And after they have provided a system and prescribed regulations for the government of all the inferior tribunals in carrying out and enforcing the provisions of their law, these rules should be strictly adhered to, or the acts of these tribunals will be *coram non judice* and void. In the case of English and others vs. Smock and others, which was a proceeding to enjoin the board of commissioners of Marion county from issuing the bonds of the county for the sum of four hundred thousand dollars, and putting them on the market to raise money to build a new court-house, and to complete the building of an asylum for the poor, already in progress of erection, after noticing several of the minor points in the case, the court says:

"The board of commissioners is a court of inferior and limited jurisdiction, and it is well settled, both on principle and by authority, that where statutory powers are conferred on such a tribunal, and a mode of executing these powers is prescribed, the course pointed out must be strictly pursued, or the act of such court will be *coram non judice* and void."(*n*) And Mr. Adams, in his work on Equity, states the rule thus: "The same principles are applicable to all other persons who have been authorized by the legislature to do any specified act which, without such authority they would be incompetent to do."(*o*) Chief Justice Marshall, in the case of Thatcher vs. Powell, says: "In a summary proceeding, where a court exercises

(*n*) 34 Ind. 115; Mossman vs. Forrest, 27 Ind. 233; White vs. Conover, 5 Blackf. p. 462. (*o*) Adams' Equity, p.212.

an extraordinary power, under a special statute prescribing its course, we think that course ought to be exactly observed, and those facts especially which give jurisdiction, ought to appear in order to show that the proceedings are *coram judice*. In other words all the facts which are essential to the exercise of the power, must affirmatively appear upon the face of the record; they cannot be supplied by proof or made out by intentment; the authorities on this point are uniform." If, on the other hand, this special authority is conferred on an inferior tribunal of limited jurisdiction, or upon commissioners, or upon any other individuals who are *quod hoc* in a judicial capacity, the rule is still more strict. It is thus laid down: When a special authority is delegated by statute to particular persons, or to an inferior tribunal affecting the property of individuals against their will, the course prescribed by law must be strictly pursued, and appear to be so upon the face of the proceedings, or the power is not well executed.(*p*) Mr. Blackwell, in his able work on tax titles says, in speaking in reference to the power conferred upon an inferior tribunal of limited jurisdiction, "There is still another rule of law which may be properly applied to powers of this character. Where a statute creates a new power, and at the same time provides the means and mode of executing it, those to whom the power is intrusted can execute it only in the mode prescribed. This rule requires a rigid adherence to the direction and forms which the legislature has seen proper to lay down for the government of its agent. The power is purely arbitrary, and this furnishes a strong reason why it should not be exercised in an arbitrary manner. If the forms required to be observed are once departed from, there is an end of all legal restraint. This would be intolerable to a free people. No court would venture to sanction a doctrine that would operate to vest such an unbounded discretion in any officer. Discretionary power is contrary to the genius of our laws and institutions.(*q*) The act of any executive officer from the President down to a

(*p*) Blackwell on Tax Titles, p. 39; Smith v. Hileman, 1 Scammon, p. 323.
(*q*) Blackwell, p. 49.

town constable is void where he has no authority, or proceeds contrary to the mode prescribed by the constitution and laws."(*r*)

The act approved March 12, 1869, confers upon a certain number of freeholders of the county, or of any township within this State, and upon the board of commissioners, an extraordinary power. And in the exercise of these powers they must follow the exact course marked out by the statute, or their acts will be *coram non judice* and void. It will be seen by reading section 1 *supra*, that the first thing to be done by the citizens of a county or township, who desire to raise by taxation a certain amount of money, to aid a railroad company in constructing its road through said county or township, is to get up a petition.

Form where a county appropriation is prayed for:

To the Honorable Board of Commissioners of Vermillion county:

We, the undersigned, resident freeholders of Vermillion county, Indiana, would respectfully ask your honors to make an appropriation from said county of one hundred thousand dollars to aid the Evansville, Terre Haute & Chicago Railway Company, a corporation now duly organized under the laws of the State of Indiana, in constructing its road through said county; and that you take stock in said company to that amount. And we will ever pray.

[To be signed by one hundred freeholders.]

This petition must be signed by one hundred resident freeholders of the county. And it would seem that if the petitioner is a freeholder that this is all the qualification the law requires, but we think otherwise. To petition a tribunal for a public favor requires an intelligent act, and an understanding of the wants of the people. And we think that this statute should be taken and construed in connection with the rules of the common law, which require all acts to be done by a free, intelligent agent. Therefore the petition must not only be signed by one hundred free-

(*r*) Blackwell, p. 55.

holders, but by one hundred adult, free, intelligent land owners of the county. A petition signed by idiots, insane or destracted freeholders of the county, would be insufficient; or a petition signed by one hundred minors, or married women freeholders, would be bad. See ante p. —— of this work.

The petition must ask for a specific amount; the amount must be specified in the petition in clear and comprehensive language, so that it can be readily understood, or the whole proceeding will fall to the ground. Our supreme court held, in the case of the Detroit, Eel River & Illinois Railroad Company (not reported yet) vs. Daniel R. Bears, that a petition that prayed for an appropriation of an amount of two per cent. on the taxable property of a township, was not sufficient. The amount must be definitely named in the petition in dollars and cents, and must not rest on some mathematical calculation, which the citizens will have to make before they can ascertain the amount asked for in the petition. The amount asked for in the petition must not exceed two per centum upon the amount of taxable property of such county or township as the case may be, as appears on the tax duplicate of such county for the preceding year. If the petition asks for a greater amount than two per centum upon the amount of taxable property of such county or township as appears on the tax duplicate of such county for the preceding year, it will not be sufficient and the whole proceeding must fall to the ground. The freeholders are not authorized by the law to ask for more than this, and if they do their act is without authority and void. The first thing that the citizens of any county or township who wish to raise money in this way should do, is to ascertain the exact amount of taxable property both real and personal of such county or township, as it appears on the tax duplicate of the county delivered to the treasurer by the auditor of the county for the preceding year, and then ascertain what two per centum of this amount would be, and draft their petition to suit the fact. They can ask for two per centum or any amount under that sum, but they

can ask for no more. If the amount asked for in the petition exceed the two per centum on the tax duplicate for the year preceding the filing of the petition, by one dollar, the whole proceeding will be void. This law, says our supreme court, in the case of ——— ———, must be carried out in letter and spirit.

The railroad company must have been regularly organized under the laws of the State before the filing of the petition, and its road must run through some portion of the county or township which is proposing to make the appropriation. After the petition has been signed by the requisite number of freeholders, you must take it to the county seat and present it to the board of commissioners while in session, either at a regular or special sitting, make the proof that the signers are all resident freeholders of the county or township proposing to make the appropriation, then hand your petition to the county auditor, have him mark it filed. It will then be in the hands of the commissioners, who, if satisfied that the petition has been properly signed by the requisite number of freeholders of such county or township, must cause the same to be entered at full length on the record. After this is done, the law says they must take said petition under advisement. The sentence "shall take said petition under advisement," means shall take said petition for examination, consultation, or for information. Under this section of the statute it is made the duty of the board to examine the petition, and see whether it is correct in form—whether the petitioners are all *compus mentis* and adult citizens of the county. They must also examine the duplicate of their county delivered to the treasurer of the county by the auditor thereof for the year preceding the filing of the petition, and see whether the amount asked for in the petition exceeds two per centum on the amount of taxable property of the county or township asking for the appropriation, as appears on said duplicate. They should also examine their own record, and ascertain whether there has been any other tax levied upon the people of the county or township, proposing to make the appropriation in the last two years. If, on examination of all the facts, they are of the opinion that

there is a defect in the petition, or that the appropriation asked for in the petition exceeds two per centum on the taxable property of such county or township, as appears on the treasurer's duplicate for the preceding year, or that there has been a former tax levied which, together with the one asked for, will exceed two per centum on the taxable property or the tax duplicate of the county in any one period of two years. Or if there is any other valid defect they should proceed no further, but refuse to grant the prayer of the petiton at once. But if the board is clearly of the opinion that all the requirements of the law have been complied with, they should enter their conclusion of record, and thereupon order the polls at the several voting places in the county or township, as the case may be, to be opened on a day to be named in their order, which shall not be less than thirty nor more than sixty days from the granting of the order to take the votes of the legal voters of such county or township, to be taken upon the subject of such county or township appropriating money for the purpose of aiding in the constructing of such railroad as prayed for in the said petition.

Great care should be taken in making up the record of the board in such cases.

FORM OF RECORD.

Board of Commissioners of Vermillion County,
September Term, 1872.

Present: A., B. and C., Commissioners.
J. A., Auditor.
L. C., Sheriff.

In matters pertaining to the tax to aid the Evansville, Terre Haute and Chicago Railway Company,

WHEREAS, a petition was presented on the second day of this term of this court, asking that an appropriation of money be made for the county to the amount of one hundred thousand dollars, to aid the Evansville, Terre Haute and Chicago Railroad Company in constructing its road through said county; and

WHEREAS, after hearing the evidence, we became satisfied that all the petitioners who signed said petition were adult resident freeholders of Vermillion county, we did then order said petition to be spread at full length upon the record of this board. We then took said petition under advisement, and after having given the same a careful examination, it is the opinion of this board that said petition is in conformity to law, and that the prayer thereof ought to be granted. It is therefore ordered that the polls be opened at the several places of voting in said county on the 25th day of October, 1872, for the purpose of taking the votes of the legal voters of said county upon the subject of appropriating money by said county for the purpose of aiding in the construction of the Evansville, Terre Haute and Chicago Railroad, as prayed for in the petition filed in this court on the second day of this term.

A.,
B.,
C.,} *Commissioners.*

After the board has found that the petition is in conformity to law, and make their order for an election, the auditor must give notice, to be published for at least four weeks successively in some newspaper of general circulation in the county; if none is published in the county, then in a newspaper most convenient thereto, and by printed handbills, to be posted in three public places in each township in said county where a county appropriation is prayed for, or in ten public places in a particular township where a township appropriation is prayed for in the petition.

The newspaper publication and the printed handbill must notify the qualified voters of the township or county from which the appropriation is to be made, that the polls will be opened on the day ordered by the board, to take the votes of the legal voters of the county or township for aiding in the construction of the railroad named in the petition to the amount specified in the petition. The auditor should be very careful and give the exact amount in dollars and cents in the notices; for unless the correct amount is set out in the notice, the whole proceeding will be void.

FORM OF NOTICE.

Notice is hereby given, that the polls will be opened at the several places of voting in Vermillion county, Indiana, on the 25th day of October, A. D., 1872, for the purpose of taking the votes of the legal voters of said county aiding the Evansville, Terre Haute and Chicago Railway Company in constructing its railroad through this county to the amount of one hundred thousand dollars; the same being ordered by the board of county commissioners of September session, 1872.

In witness whereof I have hereunto set my hand and affixed the seal of said board, this September 13th, 1872.

J—— T——,

[SEAL.] *Auditor of Vermillion County, Indiana.*

The notice or handbills must be posted by the sheriff of the county three weeks prior to the day fixed for taking the vote of the county or township. The auditor must make his official certificate that the notices were stuck up according to law.

AUDITOR'S CERTIFICATE.

I, J. T., Auditor of Vermillion County, Indiana, do hererby certify that I caused notice to be given of the time and place of holding an election in Vermillion county Indiana, for the purpose of taking the votes of the legal voters of said county, upon the subject of said county appropriating one hundred thousand dollars to aid the Evansville, Terre Haute and Chicago Railroad Company in constructing its road through the county aforesaid, for four weeks successively, prior to the 25th day of October 25th, 1872 in the Hoosier State, a weekly newspaper published in said county. The first of said publications was made on — day of ——, the second on — day of ——, the third on — day of ——, and the fourth on — day of ——, all in the year 1872. A copy of said notice is attached hereto and made a part of this certificate.

In witness whereof I have hereunto set my hand and official seal, this — day of October, 1872.

J. T., *Auditor.*

SHERIFF'S CERTIFICATE.

I, J. S. T., Sheriff of Vermillion County, Indiana, do hereby certify that I posted up printed notices of the time and place of holding an election in Vermillion county, Indiana, for the purpose of taking the votes of the legal voters of said county upon the subject of said county appropriating one hundred thousand dollars to aid the Evansville, Terre Haute and Chicago Railway Company in constructing its road through said county, in three of the most public places in each township of said county. That I stuck up in the township of H., one notice at P., one at G., one at C.; that I stuck up in the township of E., one notice at E., one at P., and one at L.; that I stuck up in the township of V., one notice at N., one at E., and one at G.; in the township of Helt, I stuck up one notice at J., one at C., one at Summit; in the township of C., I stuck up one notice at C., one at H., one at L. That I posted said notices up on the 12th and 13th days of September, 1872. A copy of said notice is hereto attached and made a part of this certificate.

In witness whereof I hereunto set my hand, this — day of ——, A. D. 1872.

J. S. T———,
Sheriff of Vermillion County, Indiana.

The auditor's and sheriff's certificates must be entered by the auditor upon the record of the board of commissioners.

It is also provided by section 1, *supra*, that whenever a petition shall be presented to the board of commissioners of any county in this State, signed by twenty-five freeholders of any township in said county, asking such township to make an appropriation of money to aid a railroad company named in such petition, and then duly organized under the laws of this State, in constructing a railroad in or through such county, by taking stock in or donating money to such company, not to exceed two per cent. upon the amount of taxable property, upon the tax duplicate delivered to the treasurer of the county by the auditor thereof for the preceding year. But as the proceedings of

the board in a case of this kind are identically the same as where a county appropriation is prayed for, I shall give the form for petition in case of township appropriation, &c., and then treat them together.

Form of Petition for Township Appropriation.

To the Honorable Board of Commissioners of Vermillion Co.:

We, the undersigned, resident freeholders of Helt Township, Vermillion county, Indiana, would respectfully ask your honors to make an appropriation from the aforesaid township of twenty thousand dollars, to aid the Evansville, Terre Haute and Chicago Railway Company, a corporation now fully organized under the laws of the State of Indiana, in constructing its road through said township, and that you take stock in said company to the amount specified in this petition, and we will ever pray.

(This must be signed by 25 freeholders.)

On presenting this petition to the board, make proof that the signers are freeholders of the township and adults, &c., as in case of county appropriations. (See ante-page —.) The board must examine the petition, and order it spread on the record, &c., enter an order for an election, the same as in case of a county appropriation. The auditor must give the same notice as in case of county appropriation. There must be ten printed handbills stuck up by the sheriff in ten of the most public places in the township, at least three weeks before the day fixed for the election. The auditor and sheriff must make their certificates the same as in a county appropriation. (For forms, we refer the reader to our comment on county appropriations, ante-page, —.)

On the day set for holding the election, the polls must be opened by the township trustees and the proper inspectors in each township throughout the county; or, if a township appropriation is prayed for, at each precinct in the township. The board of judges is elected in the same way as at ordinary elections. And all adult male citizens of the age of twenty-one, residing in the county or township, are enti-

tled to vote at such an election. The ballots may be either written or printed. Those persons who wish to vote for the appropriation must have on their ballots these words: "*For the Railroad Appropriation.*" Those who wish to vote against the appropriation, must have on their tickets these words: "*Against the Railroad Appropriation.*" Unless your ticket is so written or printed, it will be rejected by the inspector and board of judges. If two or more ballots are found purposely folded together, they shall be rejected.

After the ballots have been counted, the board of judges shall make out a certificate under their hands, stating in words the number of votes given for the appropriation to the railroad company, and the number given against the appropriation, and such certificate, together with one of the lists of votes or poll books, and one of the tally sheets, shall be deposited with the inspector, or with one of the judges selected by the board of judges. The inspector of each township, or precinct, or judge of election to whom such certificate, poll books and tally sheets, shall, when the question is as to appropriation by the entire county, constitute a board of canvassers, who shall canvass and estimate the certificate, poll books and tally sheets. For which purpose they shall meet at the court house on Thursday next succeeding the day of such voting, between the hours of ten o'clock A. M. and six o'clock P. M. When the appropriation is for a township having more than one precinct. The inspector of each precinct, or judge of election to whom such certificate, poll books and tally sheets shall have been delivered, shall meet at the court house on Thursday next after election, between 10 o'clock A. M. and 6 o'clock P. M., and must canvass and estimate the certificate, poll books and tally sheets. When the members of the board of canvassers who shall assemble at the court-house shall select one of their number chairman, and the auditor shall act as their secretary, or clerk, such board, when organized, shall carefully compare and examine the papers, and shall prepare and sign a statement of the whole number of votes cast, and the number for such appropriation to the railroad company, and the number against it.

Form for the Statement of the Board of Canvassers for County Appropriation:

STATE OF INDIANA, } ss:
Vermillion County. }

Be it known that on Thursday, —— day of ———, 18—, the undersigned return judges of the several township and polls of election held in the county of Vermillion aforesaid, for the purpose of taking the votes of the qualified voters of said county upon the subject of appropriating money by such county for the purpose of aiding the Evansville, Terre Haute & Chicago Railway Company in constructing its railroad through said county. Said election was held on the 25th day of October, 1872. Having assembled at the court-house in Newport, in the county and State aforesaid, between the hours of ten o'clock A. M. and six o'clock P. M. of said —— day of ———, we did then and there selected W. P., chairman of said board; J. T., auditor of said county and ex-officio clerk of said board, was also present, acting as such clerk. Whereupon each member of the board produced the certificate of the number of votes cast at said election; also the poll books, certificates and tally sheets of said election to him delivered according to law. And after a careful examination and comparison of the papers, make the following statement: The whole number of votes cast at said election was (1,900) nineteen hundred. That the number of votes cast at said election for the appropriation to the railroad company was one thousand; the number of votes cast against said railroad appropriation, nine hundred.

This —— day of October, 1872.

W. P., *Chairman.*

S. W.,
T. W.,
M. S.,
S. M.,
H. A., } *Board of Canvassers.*

Attest: S. T., *Auditor.*

If the appropriation is to be made from a township having more than one precinct, the inspector of each precinct,

or the judge of the election to whom such certificate poll books and tally sheets shall have been delivered, shall constitute the board of canvassers, and must meet at the court house on Thursday after the election, and elect one of their number chairman, and the auditor must act as their clerk. After they are organized they must proceed to canvass and estimate the certificate, poll books and tally sheets returned by each member of such board. They must carefully prepare and sign a statement of the whole number of votes cast, and the number for and against the appropriation.

The following form may be used.

STATE OF INDIANA, }
Vermillion County. } ss.

Be it known that on Thursday, —— day of ——, 1872, the undersigned, return judges of the several polls of election, held in Helt township, Vermillion county, Indiana, on the 25th day of October, 1872, for the purpose of taking the votes of the qualified voters of said township upon the subject of appropriating money by such township, for the purpose of aiding the Evansville, Terre Haute & Chicago Railway Company in constructing its railroad through said township. Said election was held on the 25th day of October, 1872. Having assembled at the court house in the town of Newport, in said county, between the hours of ten o'clock A. M. and six o'clock P. M. of said —— day of ——, 1872, J. T., auditor of said county and ex-officio clerk of said board being present, acting as such clerk, we did then and there select W. P., chairman of said board. After organizing, each member of the board produced the certificate of the number of votes cast at his precinct at said election; also the poll books, certificate and tally sheets, of said election, delivered to him according to law. And after a careful examination and comparison of said papers, make the following statement:

The whole number of votes cast at said election, one thousand; the number of votes cast for the appropriation

to the railroad company was six hundred; the number against the railroad appropriation was four hundred.

This —— day of October, 1872.

W. P., *Chairman.*

W. S., C. W., } *Board of Canvassers.*

The above form can be used when the township has but one voting precinct with but little alteration.

These certificates must be filed with the auditor of the county, who must record them at full length in the record of the board of commissioners of said county; and he must then carefully file away and preserve the certificate, poll books and tally sheets aforesaid. If the majority of the votes cast at such election be against the railroad appropriation, the whole proceeding stops. But if the majority of the votes cast at such election be in favor of the appropriation, the board of commissioners must, at the ensuing June session, or at their June session after the vote has been taken, grant the prayer of said petition, and shall by a special tax of at least one-half the amount specified in the petition, but not exceeding one per centum upon the real and personal property in the township or county, liable to taxation for State and county purposes. Before the board will be authorized to levy this tax, they must be satisfied that every act that the law requires to be done has been performed. Each and every step, from the listing of the property by the assessor to the levy of the tax by the commissioners, is a separate and independent fact. "All the facts from the beginning to the end of the proceeding must exist, and if any material link in the chain be wanting, the whole falls to the ground for the want of sufficient authority to support it."(*g*) Every provision and requirement of this act should be carried out literally. The demands of the law are peremptory, and must be obeyed. The levy of the tax must rest on conditions precedent, and unless those conditions have been performed, the board has no authority to levy, and their

(*g*) Gowing v. Shuman, 23 Ind., 32; Blackwell on Taxtitles, p. 65. Blackwell on Tax, p. 260.

act, under such circumstances, would be absolutely void.(*h*) The board must make the first levy at the ensuing June session, and the second levy at their June session next following their first levy; for they can make them at no other time. They can levy no more than one per centum at a time upon the real and personal property of the county or township. The first levy must be equal or greater than one-half the amount prayed for in the petition; if it is made for an amount less than one-half the amount asked for in the petition, it will be void. The whole amount prayed for in the petition may be levied the first year, provided that amount does not exceed one per centum upon the taxable property of the county or township. The residue of the tax must be levied at the June session one year from the first levy, and it can be levied at no other time. As a general rule, where a tribunal is authorized to levy a certain per cent. of tax, a levy of a less amount will be valid.(*i*) But this rule is not a safe one to follow in all cases, and the board should levy the amount authorized by law, no more nor no less. From the peculiar reading of sections one and twelve, *supra*, we have almost come to the conclusion that the board has no authority to levy any other amount than the one asked for in the petition. It is evident they can levy no greater amount, and the authority to levy a less amount is not well settled by adjudication. If any one of the different officers whose duty it is to carry out this act, fail to perform their duty, the whole proceeding must fall to the ground. Unless every requirement of the law has been strictly complied with, the board should refuse to make the levy. The members of the board may sometimes become much interested in the building of a railroad, and in their zeal to accomplish their object, they may sometimes be inclined to levy a tax whether it is authorized by law or not; but they should remember that their duties are marked out by the statute, and that all their acts which are not authorized by the law are absolutely void. They should not usurp authority or violate their official oaths merely for the sake

(*h*) Blackwell on Tax, p. 260. (*i*) Blackwell on Tax, p. 16.

of gain. They should always say, under such circumstances, we can act only as the law directs; and unless the necessary steps have been taken to give us jurisdiction in the case, we will make no levy. When the legislature fixes a way for the people to be taxed, they can be taxed in that way only.

If the levy of the tax has been made without authority, the collection of the same can be enjoined by the higher courts of the State.

The board of commissioners, after the tax so levied, or any part thereof, shall have been collected, may take stock in such railroad company, from time to time, in the name of the proper county or township, as the case may be, and pay therefor when the money is collected. They may donate the money raised by taxation to such railroad company for the purpose of aiding in the construction of such railroad, and they can pay the same over from time to time. They may use any money in the county treasury not otherwise appropriated to pay for their stock, or to make their donation, provided they refund the same when they collect the special tax. But they can make no donation until the railroad to be constructed shall have been permanently located, and work done on the same by the company equal to the amount of the donation then made. But they can only pay over one-half of the money until after the road is completed and the iron laid upon the road, and a train of cars shall have passed over the entire length thereof in such county or township, as the case may be. After the railroad company has completed its work through the township or county making such appropriation, the railroad company or any citizen may compel the board of commissioners, by mandamus, to pay over the money to the company.

If the railroad fails to commence work in one year from the time of the levy of the tax, or shall fail to complete their road ready for use within three years from the time of the levy, they shall forfeit their right to such donations; but the board may, for good cause shown, give further time, not to exceed one year, in which to complete the same.

NOTES.

In the Lafayette, Muncie, and Bloomington Railroad Company and Another vs. Gerger, 34 Ind. p. 185.

Constitutional Law.—Legislative Power.—When the constitution of a State vests in the General Assembly all legislative power, as does ours, (article 5, section 1), it is to be construed as a general grant of power, and as authorizing such Legislature to pass any law within the ordinary functions of legislation, if not delegated to the federal government or prohibited by the State constitution.

Same.—Construction.—Constitutions are to receive a strict construction, and acts of the Legislature are to be liberally construed.

Same.—"Incorporated Company."—The words "incorporated company" in section 6 of article 10 of the constitution of this State, refer to those associations which are created for public benefit, and to which the government delegates a portion of its sovereign power, to be exercised for public utility—such as turnpikes. John vs. The Cincinnati, Richmond, and Fort Wayne Railroad Company and Another.

Constitutional Law.—Subscriptions to Railroads.—Townships.—Taxes.—The State may make internal improvements, directly, or by a corporation, and for that purpose, levy and collect taxes, or empower counties and townships to do so, and subscribe and pay for stock in a railroad company.

Same.—The act, approved May 12th, 1869, "to authorize aid to the construction of railroads, by townships and counties taking stock in," &c., contemplates a payment for stock at the time of subscription, and not the creation for a debt therefor, and is constitutional. 55 Ind. p. 539.

In The Detroit, Eel River, and Illinois Railroad Company et al., vs. Daniel R. Bearss.

Came the parties, by their attorneys, and the court being sufficiently advised in the premises, gave the following opinion, and judgment pronounced by Buskirk, C. J.

The appellees filed their complaint in the court below against the appellants, to enjoin the collection of a tax levied in Jefferson township, Miami county, Indiana, in pursuance of a vote of the citizens of said township to aid in the construction of the Detroit, Eel River, and Illinois Railroad through said township, a temporary injunction restraining the collection of said tax was granted by the court below, from which this appeal was taken. The following are the reasons set out in the complaint why the said tax should be enjoined:

1. That neither the petition which was presented to the board of commissioners, or notice given by the auditor, properly specified the amount to be appropriated by said township to aid in the construction of said railroad.

2. That no legal notice was given of the said vote or of the time and place of holding said election.

3. That the certificate of the sheriff as to the posting up of said notices of said election in said township was defective, because it did not specify the places at which he posted them, so that it could be ascertained whether they were public places.

4. That the notices were not posted up in ten public places in said township.

5. That there was a large portion of the ballots which were cast and counted

in favor of said appropriation, were written for the railroad instead of "for the railroad appropriation."

6. That there was no registry of the qualified voters of said township at said election, nor was the last preceding registry before said board of election.

7. That the tax was levied in July, 1871, when it does not appear that there was a legally called session of the board, and when the ——of May 12th, 1869, required that said tax should be levied at the regular June session of the board.

8. That no work had been done in the said township in the construction of said road within one year from the time of levying the special tax.

We will dispose of the objections urged in the order in which they are stated.

Did the petition specify the amount of money which was to be appropriated to aid in the construction of said road? The amount asked for in the petition, and that stated in the notice, was "two per cent. upon the taxables of said township."

The first section of said act reads as follows: Section 1. Be it enacted by the General Assembly of the State of Indiana, that whenever a petitition shall be presented to the Board of Commissioners of any county in the State, at any regular or special session thereof, signed by one hundred or more freeholders of said county, asking said board to make an appropriation of money to aid a railroad company named in said petition, then duly organized under the laws of this State, in the construction of a railroad in or through such county, or whenever such a petition shall be presented to such Board of Commissioners, as aforesaid, signed by twenty-five freeholders of any township of such county, asking such township to make an appropriation of money to aid a railroad company named in such petition, and then duly organized as aforesaid, in constructing a railroad in or through such township by taking stock in or donating money to such company to an amount specified in such petition not exceeding, however, two per centum upon the amount of the taxable property of such county, or township, as the case may be, on the tax duplicate of the county delivered to the treasurer of the county for the preceding year, it shall be the duty of such Board of Commissioners, after being satisfied that such petition has been properly signed by the required number of freeholders of such county or township, as aforesaid, to cause the same to be entered at full length upon their record.

The third section of said act reads as follows:

"Sec. 3. The auditor of said county shall immediately give notice, to be published at least four weeks successively in some newspaper of general circulation in the county, or, if none be published therein, some newspaper most convenient thereto, and by private handbills, to be posted in three public places in each township of the county where a county appropriation is prayed for, or in ten public places in the particular township where a township appropriation is prayed for in the petition. Said handbills shall be posted by the sheriff of the county, three weeks before the day fixed for the taking the vote of the county or of the particular township named in said petition, as the case may be, and the same, as well as said newspaper publication, shall notify the qualified voters of the county, or of the particular township, as the case may be, that the polls will be opened, on the day fixed by the order of the board of commissioners, at the several voting places in the county, or in the township, as the case may be, to take the votes of the legal voters thereof upon the subject of such county or

township aiding in the construction of the railroad named in such petition, to an amount to be specified in such notice; and the auditor of the county shall make his official certificate that said notice was published, and said sheriff shall make his like certificate that said handbills were posted as required by this act, which certificate shall be entered upon the record of the board of commissioners, and shall be sufficient evidence of the facts therein stated."

It will be observed that the first section requires that the petition shall specify the amount to be appropriated, not, however, exceeding two per centum upon the amount of the taxable property of such county or township on the tax duplicate of the county, delivered to the treasurer of the county for the preceding year. It is required by the third section that "the amount shall be specified in the notice." The petition did not specify any amount. It asked for two per cent. upon the taxable property of the township. Two per cent. upon the taxable property of the township is a specific proposition, but not a specific amount. The amount of taxables varies every year, and the amount would not be the same in any two successive years. No year is mentioned in the petition, and it might mean the current year or the year preceding, upon which the tax had been recently paid. This uncertainty is fatal. It is the amount that is required to be specified, and not the per centum. In the first section of the said act, a clear distinction is made between the amount and the per centum, for it is provided that the amount shall be specified, which amount shall not exceed two per centum of the taxable property of the preceding year.

It is maintained by the appellants, that "that is certain which can be made certain." We do not think, from the language used in the first and third sections of the act under consideration, that the legislature intended that the tax payers should be required to go to the tax duplicate and ascertain the amount of the taxables, and then make a calculation to ascertain the amount to be assessed. The amount is imperatively required to be specified, but there is a limitation placed upon the board, by providing that such amount shall not exceed two per cent. of the taxables upon the duplicate for the preceding year. When the amount of the appropriation is stated, in the petition and notice, in dollars and cents, the tax payers will know the extent of the burden they are asked to assume. The State, ex. rel. Lexington, &c., R. R. Co. v. Saline County, 215 Mo. 242; Neal vs. Saline County, 48 Mo. 390.

It was said in Adrian vs. McCaffrety, 2 Robeson (N. Y.), 155, that where a statute, in effect, strips an individual of his property or title, or which in any way affects the same, its requirements must be strictly complied with, to enable parties purchasing to acquire a title. Moreover, the requirements of the statutes are the very conditions upon which the owner is divested of his title and property; and it does not lie with the court to consider whether the statute was reasonable, or whether the notice in the case nearly complied with the act, but whether the provisions of the statute have been literally and strictly pursued. The two cases (Culver vs. Hayden, 1 Ver. R. 359, and the cases therein cited, and Spear vs. Ditty, 9 Ver. R. 282,) cited in the plaintiff's points, establish this view. See Blackwell on Tax Titles, 213.

The cases of Wheeler vs. Mills, 40 Barb. 644, and Broner vs. Eastman, 50 Barb. 639, are very much in point, and fully sustain the view above expressed. We are of the opinion that the petition and the notice were fatally defective, for

not specifying the amount of the appropriation. This disposes of the first and second objections.

As to the third objection, we are of the opinion that the certificate of the sheriff that he had posted up the notices in ten public places in the township, is *prima facie* evidence of the fact. While it would be the better practice for the sheriff, in his certificate, to state at what places he posted the notices, we do not think that the certificate would be defective for the failure to so state.

We are of the opinion that the fourth objection, if true in fact, would be fatal to the validity of the election. As the third section imperatively requires that the notice must be posted in ten public places in the township, there must be a strict and rigid compliance with this plain and undoubted requirement of the statute.

We are of the opinion that there is nothing in the fifth objection. It is provided in the second section of said act that "the judges and inspectors of elections shall be governed in the reception of votes by the laws then in force regulating general elections. No special registry shall be required as preliminary to the election prescribed by this act, but the last preceding registry shall govern."

Such an irregularity at a general election would not effect the validity of the election. See sections 14 and 15 of the acts for contesting elections, 1 G. & H., 318; Gass v. The State ex rel. Clark, 34 Ind., 425. There is nothing in the sixth objection. The vote was taken on the 7th day of August, 1869. The registry law was repealed on the 13th of May, 1869. 3 Ind. Stat. 235. We are of the opinion that the seventh objection is valid, and is fatal to the validity of the levy of the special tax. The twelfth section of said act reads as follows:

"Sec. 12. If a majority of the votes cast should be in favor of such railroad appropriation, the Board of County Commissioners, at their ensuing regular June session, shall grant the prayer of said petition, and shall levy a special tax of at least one-half the amount specified in said petition, but not exceeding one per centum upon the real and personal property in the county or township, as the case may be, liable to taxation for State and county purposes, which tax shall be collected, in all respects, as other taxes are collected for State and county purposes, and if the sum as levied shall not be equal to the amount specified in said petition, then the residue thereof shall be levied by said Board of County Commissioners at the June session of the following year."

The above section provides that the Board of County Commissioners, at their ensuing regular June session, shall grant the prayers of the said petition, and shall levy a special tax of at least one-half of the amount specified in said petition. It is also provided in the latter clause of said section, "And if the sum so levied shall not be equal to the amount specified in said petition, then the residue thereof shall be levied by said Board of County Commissioners at the June session of the following year.

We think that it is very manifest that the legislature intended that the levy should be made at the regular June session, and at no other time. In our opinion it is mandatory and not directory. If it should be ascertained within a month after the first levy at the regular June session that the sum levied was not equal to the amount specified in the petition, the residue could not be levid at any intermediate regular session. It can only be done at the next regular June session. There is no power given to make the levy at any other time than at the regular June session.

It was by this court, in English et al. v. Smock et al., 34 Ind., 115, held that the Board of Commissioners is a court of inferior and limited jurisdiction, and it is well settled, both in principal and authority, that where statutory provisions are conferred on such a tribunal, and a mode of executing those powers is prescribed, the course pointed out must be strictly pursued or the acts of such court will be *coram non judice* and void. When such a court has been entrusted with the exercise of discretionary powers, and the acts done are within the power conferred, and have been performed in good faith, then no court possesses the power to interfere with or control such discretion.

This leaves for our consideration and decision the eighth objection. The eighteenth section of said act reads as follows:

"Sec. 18. A failure on the part of the railroad company to commence work upon the railroad in said county within one year from the levying of such tax, or failure to complete such railroad ready for use within three years from such levying, shall forfeit the rights of such company to such donation, unless the County Commissioners, for good cause shown, shall give not to exceed one year further time in which to complete the same, and the money raised by said special tax shall go into the general fund of the county or township, as the case may be, and used accordingly."

The railroad company for answer denied the truth of the allegations contained in the complaint in reference to the failure of the company to commence work upon the railroad within said township within one year from the levying of the tax. Affidavits and counter affidavits were filed. An affidavit was filed by the appellees, which was made by eighteen citizens and taxpayers of said township, in which it is stated that for more than one year after the levying of such railroad tax, to-wit: for more than one year after the 15th of June, 1870, said railroad company failed to commence any work on said road within said county of Miami, nor was any work commenced on said railroad from said 15th of June, 1870, until the 1st day of March, 1872, in said county of Miami. Said affidavits further say, as they are informed, and believe, one Harrison Grimes, a resident and large land holder of Union township, in said Miami county (which township is not subject to any such railroad tax, being on the line of said railroad and interested in the same) on or about the —— day of ———— 1871, by a coalition with the officers and stockholders of said railroad company, and for the purpose of evading the provisions of section 18 of the railroad act of May 12th, 1869, and pending a forfeiture of said tax west on the line where he supposed said railroad line would run, and used a plow or scraper less than half of one day; that at the time there had been no letting of the work on said road; that said line of road was not defined, no stakes had been set by the engineer, and the work performed was under no contract for the construction of said road, and said work was of no value or benefit in the construction of said railroad, and done for no other purpose than as a pretense and to evade a requirement of law—all of which facts as herein stated are substantially true as said affiants of their own personal knowledge and from the best information believe true.

The appellants filed the affidavits of the said Harrison Grimes, who, upon oath, states that he is a resident of Miami county, Indiana, and has been for the last five years; that he was employed to work, and did work, for the Detroit, Eel River and Illinois Railroad between the 1st and 6th days of June, 1871, at a

point on said railroad within the township of Jefferson, in said county of Miami; that said work was done by him and others in his employ, and was done in grading the road bed of said railroad, and preparing it for the ties; that said railroad company paid him for said work, and he gave a receipt to the company for the same; that said work is now progressing rapidly on said railroad, and bids fair to be completed within the next six months. R. R. Charles and Samuel Lewis filed affidavits in substance the same as that of Mr. Grimes.

It will be observed that Mr. Grimes does not controvert the truth of the statements in the affidavits filed by the appellees; "that at the time there had been no letting of the work on said road;" that no stakes had been set by an engineer, and that the work performed was under no contract for the construction of said road. Mr. Grimes in his affidavits studiously avoided stating how much work he did or how much he received from the company for such work. He seems to be equally cautious in his statement that the work was progressing rapidly. It would have been more to the purpose, and far more satisfactory, if he had stated what progress had been made in the construction of said road in Miami county, and especially in Jefferson township, in said county. We are required to give a reasonable and common sense construction to the 18th section, and one that will fairly carry into effect the legislative intention.

It is further provided that a failure to commence work within one year from the time of levying the special tax shall work a forfeiture unless the time is extended by the order of the Board of County Commissioners.

What was intended by the phrase "to commence work?" We think it means that the company shall commence work in good faith and with the honest purpose of constructing the road within a reasonable time, taking into consideration the extent and character of the work to be done. The most favorable view that can be taken for the company is that Grimes worked from the 1st to the 6th of June. This failure to state how many hands he had employed, and how many days and hours they work, creates a very strong presumption that the time stated in the affidavit filed by the appellees was the true time.

We know that railroad companies do not commence the construction of their railroad beds until there has been a survey of the route, until the exact location of the line has been fixed and grades established. We cannot regard the work done in Jefferson township as any compliance with undoubted requirements of the eighteenth section of said act.

We entertain no doubt that the levy of the special tax was illegal and void, and that the decision of the court below was correct.

The judgment below is affirmed, with costs.

WORDEN, J., concurs in the judgment, but is of the opinion that the petition and notice sufficiently specify the amount to be appropriated.

It is, therefore, considered by the court that the judgment of the court below, in the above entitled cause, be in all things affirmed, at the costs of the appellants, all of which is ordered to be certified to said court.

And it is further considered by the court that the appellees recover of the appellants the sum of ——— dollars and ——— cents for their costs and in this behalf expended.

In the case of Garrigus et al. v. The Board of Commissioners of Parke-

County, 39 Ind. 68, appeal from the Parke Circuit Court, Buskirk, C. J., says:

The appellants filed a complaint in the court below, to perpetually enjoin the collection of a tax that was levied by the Board of Commissioners of Parke county, to aid in the construction of the Indiana and Illinois Central Railroad and the Indiana Northern and Southern Railroad, which special tax was levied in pursuance of a vote that was taken in said county on the 13th day of November, 1869.

A demurrer was sustained to the complaint, to which ruling a proper exception was taken, and, the appellants refusing to plead further, final judgment was rendered for the appellee, from which judgment the appellants have appealed to this court, and have assigned for error the sustaining of the demurrer to the complaint.

The petition which was presented to the Board of County Commissioners was as follows:

"*To the Hon. Board of Commissioners of Parke County, Indiana:*

"The undersigned, freeholders of said county, would respectfully petition your honorable board to make an appropriation of money to aid the Indiana and Illinois Central Railroad and the Indiana Northern and Southern Railroad Company, now duly organized under the laws of the State of Indiana, in the construction of said railroads in said county, by taking stock in, or donating money to, said companies, in the amount of two hundred thousand dollars in said county, one-half of the amount appropriated to be given to each company, not exceeding, however, two per centum upon the taxables of said county, on the condition, as to the said 'Indiana Northern and Southern Railway Company,' that they commence the work on their road between Brazil, in Clay county, and Attica, in Fountain county, within six months from the day of election making the appropriation, and that said company complete the building of said road within two years from said day, and that the town of Rockville, in said county, is made a point, and said road run within one-half mile of the town of Bridgetown, in said county.'

Various objections are urged against the validity of the levy of the special tax, but the conclusion at which we have arrived renders it unnecessary for us to consider and determine any of the questions that have been argued with so much ability by the learned counsel engaged in this cause, but one, and that is stated in the complaint, as follows:

"Second. Because the aforesaid petition indicates and asks an appropriation to two railroad companies, and because said election was holden in such a manner that the said voters could not vote for or against an appropriation to either of said railroad companies without voting for or against both."

The question is now presented for the first time, under the act of May 12th, 1869, whether it is legal for the Board of Commissioners of a county to submit to the voters of a county a proposition to vote for an appropriation in aid of two or more companies, when the question is so submitted that the voters cannot vote for one and against the other, but must vote for both or against both.

The question is one of great practical importance to the people of the State, and we have given it very thoughtful and mature consideration. We have been greatly aided by the very able and exhaustive oral argument with which we have been favored.

It is maintained by the appellants that a vote for or against two railroad com-

panies is illegal and void for two reasons: first, that it is manifest from the language of the act under consideration that it was the intention of the legislature that the vote should be taken for or against an appropriation to aid in the construction of one railroad; second, that a vote which is taken for or against two railroads, where the voters do not have the right to vote for one and against the other, is against public policy, for the reason that it effects a combination of opposite and diverse interests, and produces a system of log-rolling, by which the proposition to aid two roads is carried, when, if the vote had been taken separately on each proposition, both might have been defeated, or one might be carried and the other defeated.

It is maintained by the appellee that the title of the act in question should be considered, with the view of ascertaining the intention of the law-makers; and that the title of said act being in the plural, the singular number used in the body of said act should be construed to refer to the plural.

It is further maintained that a vote for or against aid to two railroads is not against public policy, and will not prevent a fair and unbiased expression of the popular will; and that, as the act limits the amount which may be levied, in any two years, to two per centum upon the taxable property, there is no danger that unreasonable and oppressive burdens will be placed upon the taxpayers.

It will appear from an examination of the act of May 12th, 1869, that where reference is made to the aid of railroads, it is invariably in the singular number. Nowhere in the body of the act is reference made to railroad companies. The following expressions will be found in the act: in the first section, "to aid a railroad company;" "to such company." In the third section will be found, "aiding in the construction of the railroad named in such petition." In the sixth section is the following: "to aid such railroad company." In the seventh section is this expression: "the appropriation to the railroad company." In the twelfth section occur these words: "such railroad appropriation." The propositions which are submitted to the voters are stated thus: "For the railroad appropriation;" "Against the railroad appropriation."

The following rule of interpretation is stated by Smith, in his work on Constitutional and Statutory Construction, sec. 545, p. 688: "In the interpretation of statutes, if the words used express clearly the sense and intention of the law, they must always govern. For, as we have seen, it is not permitted to interpret what is plain and manifest, as it stands in no need of interpretation. When an act is conceived in clear and precise terms—when the sense is manifest, and leads to nothing absurd, there can be no reason to refuse the sense which it naturally presents to the mind."

But it is earnestly maintained by the learned counsel for the appellee, that "words importing the singular number only, may also be applied to the plural of persons and things." Sec. 798 of the code, 2 G. & H. 336.

This construction is only to be given to the words of a statute or instrument, when the plain and evident sense and meaning of the words, to be derived from the context, render such a construction necessary to give effect to the intention of the makers of the statute or instrument. We do not think we would be justified in placing such a construction upon the statute under consideration. Full effect and force can be given to the act without such a construction.

It is also maintained that the title of a statute may be a guide to the intention

of the law-makers, and in support of this position reference is made to the following authorities: Smith vs. The State, 28 Ind. 321; The United States vs. Palmer, 3 Wheat. 610; Lessee of Burgett vs. Burgett, 1 Ohio, 469; Eastman v. McAlpin, 1 Kelly, 157; Cohen vs. Barrett, 5 Cal. 195.

The above proposition is correct, with this additional qualification, "where the statute appears to be ambiguous or doubtful." 1 Cooley's Blackstone, 59.

It was said by Marshall, C. J., in The United States vs. Palmer, *supra*, that "the title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature."

It was also said in The United States vs. Fisher, 2 Cranch, 386: "On the influence which the title ought to have in construing the enacting clauses, much has been said; and yet it is not easy to discern the point of difference between the opposing counsel in this respect. Neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction."

Judge Cooley, in his work on Constitutional Limitations, page 141, states the law the same as the above, but adds: "Titles to legislative acts, however, have recently, in some states, come to possess very great importance, by reason of constitutional provisions, which not only require that they shall correctly indicate the purpose of the law, but which absolutely make the title to control, and exclude everything from effect and operation as law which is incorporated in the body of the act, but is not in the purpose indicated in the title. These provisions are given in the note, and it will readily be perceived that they make a very great change in the law."

But it is not said by Judge Cooley, or any other writer that we know of, that the constitutional provisions in reference to the titles of an act have so changed the rules of construction that the title may be looked to when the words of the statute are plain and unambiguous; and we do not think that such rules have been so changed. The only effect of such provisions in reference to titles of an act is to give greater weight and consideration to the title in ascertaining "the mind of the legislature," than was formerly given to titles where the language of the act is ambiguous and doubtful.

The title of the act under consideration is as follows: "An act to authorize aid to the construction of railroads by counties and townships taking stock in and making donations to railroad companies."

The constitution of Indiana provides, that "every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." Sec. 19, article 4, 1 G. & H. 39.

The subject-matter of said act is aid to railroad companies. Under our constitution, all laws have to be general wherever a general law can be passed. A local or special law on the subject of aid to a railroad company, would have been unconstitutional and void. And as the subject-matter of the act must be expressed in the title, the title of the act in question was made broad and comprehensive enough to embrace and apply to all railroad companies in the State. But it does not result that more than one railroad company can apply for such

aid at the same time and in the same proceeding, where the vote must be for or against both. As we have seen, the title embraces all the railroad companies organized in the State, while the body of the act provides for separate and distinct proceedings on the part of the several railroad companies in obtaining aid in the construction of their respective roads. All are entitled to the benefits of the act, but each must receive the aid separately.

We are very clearly of the opinion that the plain and obvious purpose of the legislature, to be derived from the plain and unambiguous language of the act, was, that the voters of a county or township should have the privilege of voting for or against any proposition that might be submitted to them, without being compelled to vote for or against some other proposition that they would not have freely and of their own choice voted for.

The views above expressed are based upon the wording of the act, and what seems to us to have been the intention of the Legislature. We are not without authority on the proper construction of the act in question. The act of May 12th, 1869, was copied mainly from a statute of Illinois, and the Supreme Court of that State have placed a construction upon such statute. It is well settled that where a statute is borrowed from the statutes of another State, the construction placed upon such statute by the courts of such State is entitled to great weight and consideration.

The Supreme Court of Illinois, in the case of Supervisors of Fulton County vs. The Mississippi and Wabash R. R. Co., 21 Ill., 338, placed a construction upon said statute. The court say: "Another objection has been made by complainants which we deem necessary to notice now. It is as to the manner in which this question of subscription to the stock of this road was submitted to the vote of the people." The court, after quoting two sections of the statute, proceed to say: "The order made by the board of supervisors of Fulton county, under this law, does not seem to be in strict conformity to it. The law evidently contemplates a vote for or against subscription, to some one company only, specifying the company. The order is for a subscription to the Mississippi and Wabash River Railroad Company, and the Petersburg and Springfield Railroad Company, seventy-five thousand dollars to each.

"This is not only not pursuant to the law, but is manifestly unfair. All elections, as well for measures as men, should be perfectly free, uninfluenced by any consideration, other than the merits of the individual man or measure proposed. We boast of the freedom of the elective franchise; should we not strive to swell the boast by its purity also? A single, isolated measure, such as a railroad, may not unite a majority of a county to whom it is proposed. It may favor, if constructed, one portion of a county more than another, and thereby be prevented from receiving a clear majority vote, such as the law clearly contemplates shall be given. Is it fair, in order to accomplish this object, to attach another measure to it, to be voted on at the same time, which may benefit the opposing portion of the county? The law never intended that two roads should be coupled together, and the people forbidden to vote for one if they did not also vote for the other, the one road being really a bribe offered for votes for the other. The truth is, the voters of Fulton have never had an opportunity to vote, and never have voted this subscription, for the question was at no time distinctly before

them. The question before them was, will you vote for a subscription to two roads? Neither road has received the approving vote of the people, and until that is done, until the naked, single question shall be fairly presented to those voters, they ought not to be bound, or injuriously affected, by any such jockeying management and log-rolling. By this system, condemned as it has always been by the moral sense as well as sense of justice of the whole country, it should at this day find no favor in the courts. We do not hesitate to say, this proposition to vote on two roads at the same time was not authorized by the law, and is a fraud on the people.

"This tacking one measure upon anohter, is unjust in another view, as it gives the county court power to weigh down a popular single measure, by attaching odious measures to it, and thus virtually depriving the people of their right to vote on the one measure, the success of which would greatly promote their interests.

"Such maneuvering should be condemned everywhere, as unfair and unjust, and so we regard it."

The ruling in the above case was followed in two subsequent cases in that court, The People, etc., vs. County of Tazewell, 22 Ill. 147; Clarke vs. The Board of Supervisors of Hancock County, 27 Ill. 305, and such may be regarded as the settled construction of the law of that State.

The State of Iowa has a law very much like ours. The Supreme Court of that State has placed a construction upon the manner of submitting the vote to the people. In the case of McMillan vs. Lee County, 3 Iowa, 311, the court say: "'There is still another objection which we must regard as equally fatal to the validity of the proceedings, on which the authority claimed by the county judge in this instance, is based. Every proposition for the borrowing or expenditure of money by a county, and for the levy of a tax to pay the same, receives its vitality as a law from the majority of the votes of the people cast in its favor. Such being the case, we think it is evidently the policy of the law, no less than its spirit and intention, that the vote of the people should be permitted to be cast for or against the propositions submitted, with no restraint upon the free expression of their choice. We have said that in our opinion, the law contemplates unity and distinctness in the question authorized to be submitted, in contradistinction to the uniting of several questions in the same proposition, or the incumbering of any proposition with conditions not required or not permitted by the statute. The proceedings coming under our notice in this cause present a most forcible illustration of the wisdom of what we deem to have been the policy of the statute. The people were not called upon, nor were they permitted, to decide by their votes whether the county of Lee should borrow money for one purpose or object. No single question was submitted to their votes to be decided upon its own merits, or by the judgment of the people in its favor. Nor were the three propositions submitted at once, to be voted upon and to be decided upon, either singly or in the aggregate. No question submitted was permitted to stand by itself, or to take effect upon the decision of the people in its favor. On the contrary, while it is contained in the proposition, that a majority of the votes cast in favor of the subscription to the stock of either company, should be considered its adoption by the people, it is also further contained and declared, 'that the said subscription shall not be made to either of said companies, unless the vote shall be carried in favor of each and all of them.'

"We cannot regard this in any other view than as an attempt to impose a condition upon the taking effect of the vote of the people adopting a proposition submitted to them, wholly unauthorized by the law. They were entitled to have the question of the county taking stock in either of these railroad companies submitted to their decision, unincumbered by any such condition or proviso. To make the success of any one proposition depend upon the adoption of all, was to take from the expression of the will of a majority of the people that essential validity intended by the law to be imparted to it."

The above decisions are very much in point, and greatly strengthen and support the views expressed by us. We regard the reasoning as wise and sound, and that the conclusions reached are in accordance with the theory and genius of our form of government.

There was much discussion, at the argument, as to the true rule of construction which should be applied to the act under consideration. The one party contended that the act should receive a strict construction, while the other insisted upon a liberal construction. There is in the State of New York a statute very similar to ours, differing only in matters of detail. The Court of Appeals in that state recently laid down the rules of construction that should be applied to such laws, which meet with our hearty approval.

In The People *v.* Smith, 45 N. Y. 772, the court say: "The power sought to be delegated to a portion of the taxable inhabitants of a municipality to burden and charge the property of all, and subject it to taxation for a purpose foreign to those for which local governments are organized, and with a view to contingent benefits, in respect to which men may differ in opinion, and in aid of works which in most instances will more largely benefit some than other portions of the district, alike and equally charged, is one of grave importance, seriously affecting the rights and pecuniary interests to the citizen, and can only be exercised in strict conformity to, and by a rigid compliance with, the letter and spirit of the act conferring the authority. Nothing can be taken by implication, and the act, as it imposes a burden upon the public, and in a manner deprives the owner of the full control and disposition of his property, by giving to others the power to encumber it, should be strictly construed in favor of the rights of property.

It is again said by the court: "While it is for the legislature to decide upon the wisdom and expediency of the enactment of a law, and the province of the court is simply to interpret the act and give it effect according to the intent of the legislature, a statute in derogation of common right will not be extended by implication, but its operation and effect will be confined to cases within the express language employed, giving it its ordinary signification, in the absence of any evidence that the legislature intended to use it in a different sense."

We are very clearly of the opinion that the court below erred in sustaining the demurrer to the complaint.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion.

CHAPTER XII.

NEW COUNTIES.

The Formation of New Counties—How done.

The act approved March 7, 1857, provides "that whenever a majority of the legal voters, to be affected thereby, in any district embracing an area of not less than two hundred square miles, shall desire the formation of a new county, and by written requests petition the Boards of Commissioners of the several counties to be affected by the formation of said new county, and shall designate in such petition the name of such new county—the boundaries of such proposed county—which shall be in the form of a square as nearly as the character of the territory out of which said new county is to be formed will permit, and which petition and qualification of the signers thereto shall be verified by the oath or oaths of competent witnesses, the said boards shall appoint each a committee of three resident freeholders in each county of the district embraced in such change who shall form a Board of Commissioners to lay off and establish the boundaries of the proposed county, conforming to the lines and boundaries named in said petition, and shall report the same to such Board of Commissioners of the several counties affected by the location of the said new county at the next or some subsequent session, and upon said report being made the Board of Commissioners of the said several counties aforesaid shall enter upon their order books respectively an order establishing the boundaries of said new county, which shall be by them filed in the office of the Secretary of State; a majority of the commissioners so appointed as aforesaid shall constitute a quorum to transact business devolving upon said commissioners under this act." But it is provided that no county now organized which shall contain a greater area than four hundred square miles shall be reduced below that number of square miles, and no

county containing less than four hundred square miles shall be further reduced.(*o*)

Under this law the first thing to be done by the citizens of the territory desiring the formation of a new county, will be to get up their petition. The petition must give the *name* of such new county, the boundaries thereof, and must show that the territory proposed to be organized into a new county contains not less than two hundred square miles.

The following form may be used:

To the Hon. Board of Commissioners of ——— county:

We, the undersigned, legal voters of the counties of —— and ——, in the State of Indiana, would represent to your honors that we live in a district of land that now lies in the aforesaid counties, which is bounded as follows, to-wit: commencing at ——, running ——, thence ——, thence ——, thence ——— to the place of beginning. Said district contains an area of two hundred square miles of territory, and is as near in the form of a square as the character of the territory will admit. That after the amount of territory included in said district is taken from the aforesaid counties, that they will each contain still an area of four hundred square miles. And believing that it will be to the interest of the people of said district to have the same organized into a new county, to be called the county of ———, and to be bounded as aforesaid. We therefore pray your honors to appoint a committee of three persons, resident freeholders, from the district of land included in the above boundaries that now lies in the county of ———, to act as a part of the Board of Commissioners to lay off and establish the boundaries of the proposed county. And we will ever pray.

(To be signed by the majority of legal votes of the entire territory that is to compose the new county.)

Address a petition of this kind to the Board of Commissioners of each county to be affected. On the presentation

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(*o*) 1 G. & H., p. 191; Act of 1857, p. 25.

of the petition you must establish the allegation of your petition by the oath or oaths of competent witnesses.

The oath or oaths may be in the following form:

STATE OF INDIANA, }
——— County, } ss:

A. T., W. S. and M. L., being duly sworn, upon their oaths say, that they have lived in the county of ———, State of Indiana, and that they are acquainted with the number of legal voters in a certain district of land that now lies in the counties of ——— and ———, in the State of Indiana, which is bounded as follows, to-wit: Commencing at ——, running thence ——, thence ———, thence ——— to place of beginning, and that we have examined the above petition and find that it contains the names of the majority of legal votes of said district of land.

A. T.
W. S.
M. L.

Subscribed and sworn to before me, this — day of ——, 18—. JOHN SHORT, Auditor.

We have given the form of an affidavit for witnesses, but under the statute the qualification and number of the petitioners may be established by oral evidence. You must establish the fact that the new county when established will contain an area of two hundred square miles, and that no organized county from which any territory composing the new county is to be taken will have, after the same is separated from it, an area of less than four hundred square miles. The number of votes cast for candidates for Congress at the last preceding election shall be taken as the number of votes in the new county. After you have made the necessary proof the board must appoint a committee of three from the district of land in their county which is to be included in the proposed new county. The committee must be composed of resident freeholders, who must meet a like number of persons appointed by the Boards of Commissioners from the other different counties to be affected; the

majority of the members constituting the Board of Commissioners thus appointed shall constitute a quorum to transact business. The committee thus appointed must be notified of their appointment within a reasonable time. The statute does not expressly state how this shall be done, but we think the auditors of the different counties should issue their precept to the sheriff of the county commanding him to notify the persons composing the board of their appointment. After they have received notice of their appointment the law fixes no definite time when they shall meet, but says they shall make their report at the next or some subsequent session of the Boards of Commissioners of the said counties. This statute allows the commissioners an extensive latitude, but where no time is fixed by law in which a thing is to be done, it must be done in a reasonable time; the commissioners must, therefore, act within a reasonable time after they have been notified of their appointment. There is no statute in this State that directly authorizes the Board of Commissioners to attach and punish men who have been appointed by them in accordance with law to perform certain specific acts, such as viewing of proposed highways, &c., &c., who refuse to act. But they may undoubtedly do so. For it is a general rule of law, of universal application, that a grant of power to a court or judge to award process, includes the power to enforce obedience to that process.(*s*)

The commissioners must, within a reasonable time after their appointment, make out and sign a report of their proceedings to each county board of the different counties to be affected. That report should be a correct history of their acts. It is their duty, under the statute, to so designate the boundary lines of said county that they can be readily found. The report may be in the following form:

To the Honorable Board of Commissioners of ——— *County:*

We, the undersigned, commissioners appointed by the Boards of Commissioners of the counties of —— and ——,

(*s*) Taylor v. Maffatt, 2 Blackford, 305; *Ex parte* Smith v., 28 Ind. 47.

State of Indiana, to lay off and establish the boundaries of a certain district of land proposed to be organized into a new county, by the name of ———; the boundaries of said new county prayed for in the petition is as follows: Commencing at ——, running thence ——, thence——, thence ———, thence ——— to the place of beginning, containing in all an area of two hundred square miles, in the State of Indiana, beg leave to report that after a careful examination of the boundaries of said district, we did lay off and establish the boundaries in conformity to the lines and boundaries named in said petition. We did set up at the south-west corner of said county a large stone, so we set up on the southern boundary line of said county stones two feet high at intervals of every two miles, so at every other corner and boundary lines we did likewise, &c., &c. Having discharged our duties, we ask to be discharged from our said trust.

———,
———,
———, } *Commissioners.*

The Boards of Commissioners of each county must make a record of all their proceedings in the premises. And after the commissioners have filed their report they must enter upon their order book an order establishing the boundary of said new county. They must cause a certified copy of this record to be filed with the Secretary of State. It will then be the duty of the Governor of the State to appoint three persons to locate the county seat, &c., &c.(*m*)

BOUNDARIES.

It is provided by the statute that whenever a majority of the legal voters who shall reside in the territory whose jurisdiction is proposed to be changed, shall desire to change the boundaries of two or more organized counties that may lay contiguous, and shall petition the Board of Commissioners of said counties, by written petition verified by oath or

(*m*) Allen and others v. Hostetter and others, 16 Ind. 15; The Board of Commissioners of Jasper county v. Spitler, 13 Ind. 235.

oaths of competent witnesses, as to the residence and qualification of such petitioners, designating in said petition the line or lines of said proposed change, the said boards shall file said petition and continue the cause until the next regular meeting, at which time they shall enter upon their order books respectively an order changing the boundaries of the several counties so as to conform the line or lines designated in said petition. After their final order they must cause a certified copy of their record to be filed with the Secretary of State.(*x*)

CHAPTER XIII.

INTOXICATING LIQUORS.

License to Retail Liquor—How Obtained.

The act, approved February 27th, 1873, reads as follows:

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That it shall be unlawful for any person, by himself or agent, to sell, barter or give away, for any purpose of gain, to any person whomsoever, any intoxicating liquors, to be drank in, upon, or about the building or premises where the liquor is sold, bartered or given away, for the purpose of gain, until such person or persons shall have obtained a permit therefor from the board of commissioners of the county where he resides, as hereinafter provided.

SEC. 2. Any person desiring a permit to sell intoxicating liquors, to be drank on the premises, shall file in the office of the auditor of the proper county, not less than twenty days before the first day of the term of any regular session of the board of commissioners of such county, a petition in writing, stating therein the building or number, street,

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(*x*) 1 G. & H. p. 192; The Board of Commissioners of Warren county v. The State on the relation of Ennes and others, 16 Ind. 250.

ward, or township wherein the permission is asked to be granted, praying for such permit, and certifying that the applicant is a resident voter of such county and a citizen of the State of Indiana, and that he is a proper person to have and receive such permit, which petition shall be signed by the applicant, and also by a majority of the legal voters resident in the ward, if it be in a city, or town, if in an incorporated town, or township where the applicant proposes to sell intoxicating liquors. Such petition shall be kept on file by the auditor until the next ensuing regular session of the board of commissioners, when it shall be presented to the board for their action. The board shall examine such petition, and if satisfied that the same is in proper form, and that it has been signed as heretofore required, shall direct a permit to be issued under the hand and seal of said auditor, and delivered to the person named in such permit, upon his complying with the provisions of this act, and paying the costs of filing and recording said petition and costs of issuing said permit.

SEC. 3. Before the granting of a permit by the board of commissioners, the applicant shall cause to be executed and properly acknowledged before an officer authorized to take an acknowledgment of deeds, a bond payable to the State of Indiana in the sum of three thousand dollars, with good freehold security thereon of not less than two persons, to be approved by the board of commissioners, and conditioned for the payment of any and all fines, penalties and forfeitures incurred by reason of the violation of any of the provisions of this act, and conditioned further that the principal and sureties therein named shall be jointly and severally liable, and shall pay to any person or persons any and all damages which shall in any manner be suffered by or inflicted upon any such person or persons, either in person or property or means of support, by reason of any sale or sales of intoxicating liquors to any person, by the person receiving such permit, or by any of his agents or employees. Separate suits may be brought on said bond by the person or persons injured; but the aggregate amount recovered thereon shall not exceed the said sum of $3,000; and in

case the amount of said bond shall be exhausted by recoveries thereon, a new bond in the same penalty, and with like sureties, shall be filed within ten days, and in default thereof, said permit shall be deemed to be revoked. Such bond, after its approval by the board of commissioners, shall be filed in the office of the auditor of the county, and shall be recorded by such auditor forthwith in a book prepared for that purpose, and shall there remain for the use of the State of Indiana, and for the use of any person or persons suffering as hereinbefore set forth. Such bond may be sued and recovered upon in any court having civil jurisdiction in the county, except justices' courts, by or for the use of any person or persons or their legal representatives, who may be injured or damaged by reason of any sale or sales of intoxicating liquors, by the person receiving this permit, or by any of his agents or employees. The record of the bond, or a copy thereof duly certified by such auditor, shall be admissible in evidence in any suit on such bond, and shall have the same force and effect as the original bond would have if offered in evidence.

SEC. 4. The whole number of votes cast for candidates for Congress at the last preceding Congressional election in the township, and the whole number of votes for councilmen or trustee in any ward or town at the last preceding municipal election in any city or town in which the applicant for a permit desires to sell said intoxicating liquors, shall be deemed to be the whole number of legal voters of such ward, district or township, a majority of whose names shall be signed to the petition of such applicant. And it is further provided that any person not a legal voter in such ward, district or township, who shall sign such petition, or any person who signs the name of any person other than himself, without the permission, previously obtained of said person, to so sign his name, shall be fined not less than $50 nor more than $100 for each signature so made.

SEC. 5. No permit, as herein provided for, shall be granted for a longer or shorter time than one year. It shall be the duty of the auditor of the county to furnish the persons to whom such permit is granted a copy of the order

of the commissioners granting the permit, which copy shall show in conspicuous letters the date of the commencement of such permit and of its expiration. And it is further provided, that such copy of the order of the commissioners, certified by the auditor, shall be hung up in a conspicuous place in the room where such liquor is sold, where the same may at all times be seen and read by every person desiring to do so. Should any person holding a permit be convicted of a violation of any of the provisions of this act, such conviction shall work a forfeiture of his permit.(*v*)

It will be seen by reading the second section of this act, a person who desires to get a permit to sell intoxicating liquors, to be drank on his premises, must get up a petition in writing, stating in the petition the building or number, street, ward or township wherein the permission is asked to be granted. He must also pray for such permit, and certify that the applicant is a resident voter of such county, and a citizen of the State of Indiana, and that he is a proper person to have and receive such permit.

The following form may be used:

To the Honorable Board of Commissioners of the County of Vermillion, and State of Indiana:

We, the undersigned, legal voters of and residents in the incorporated town of Newport, in Vermillion county, Indiana, would pray your honors to grant a permit to S. T., to sell intoxicating liquors, to be drank on the following premises: Lot No. 71, block No. 2, in the aforesaid incorporated town. We certify that the said S. T. is a resident voter of Vermillion county and a citizen of the State of Indiana, and that he is a proper person to have and receive such permit. A., B., C.

This section is quite ambiguous and hard to understand; it says that the petition shall be signed by the applicant and also by a majority of the legal voters resident in the ward, if it be in *a city, or town, if it be* an incorporated town, &c. Taking the above section alone, one would come to the

(*v*) Act of 1872 and 1873, pp. 151, 152, 153.

conclusion that the applicant who desires to sell intoxicating liquors in an incorporated town, would only have to get his petition signed by the majority of legal voters residents of such ward. But the rule of constructing statutes of this character is "that the intention of the lawmaker is to be deduced from a view of the whole and of every part of the statute taken and compared together."(*u*) Comparing the second section of this act with the fourth section, which says that the whole number of votes cast for councilman or trustee in any *ward or town*, the meaning of the section is plain and obvious. The word town in section four is used separate and apart from ward. Hence the words "majority of legal voters," as used in section two, when applied to incorporated towns, means the majority of the legal voters resident of the entire town.

Form of a petition to sell liquor in a city:

To the Honorable Board of Commissioners of the County of Vigo, State of Indiana:

We, the undersigned, legal voters and residents of ward No. 1, in the city of Terre Haute, Vigo county, Indiana, would pray your honors to grant a permit to W. S. to sell intoxicating liquors, to be drank on the following premises: Lot No. 6, block No. 1, in the aforesaid city. We certify that the said W. S. is a resident of Vigo county, and a citizen of the State of Indiana, and that he is a proper person to have and receive such permit. A., B.

In order for an applicant to get a permit who wishes to sell liquor in the ward of a city, he must sign the petition himself and get the majority of the legal voters resident of the ward he wishes to sell in.

Form for a petition where the person wishes to obtain a permit to sell liquor in an unincorporated town, or in a township:

To the Honorable Board of Commissioners of the County of Vermillion, State of Indiana:

We, the undersigned, legal voters of Eugene township,

(*u*) 1 Kent, p. 461.

Vermillion county, Indiana, would pray your honors to grant a permit to J. S. to sell intoxicating liquor, to be drank on the following premises, in the township, county and State aforesaid: Lot No. 7, block No. 6, in the town of Eugene. We certify that J. S. is a resident of Vermillion county, Indiana, and a citizen of the State of Indiana, and that he is a proper person to have and receive such permit, and we will ever pray.

C., W., G., H.

In order to get a permit to sell in any other place save in a city or incorporated town, the applicant, before he will be entitled to the permit, must get his petition signed by the majority of the legal voters of the township in which he desires to sell. In all cases the petition must be signed by the applicant, and by the majority of the legal voters of the ward, town or township in which the applicant proposes to sell. It is provided by section four of this act, that in order to ascertain the number of legal voters in any ward, town or township, the votes cast at the last municipal election in the ward or town, or the vote cast for congressman in the township in which the liquor is to be sold, shall be considered the whole number of votes in said ward, town or township. After you have got the requisite number of signers to your petition, take it to the auditor's office of the proper county, twenty days before any regular term of the board of commissioners, hand it to the auditor and have him mark it filed. It must be kept on file in the auditor's office until the ensuing regular session of such board of commissioners, when it shall be presented to the board for their action. At the time of meeting the board must examine such petition, and if satisfied that it is in proper form, and that it has been signed by the required number of freeholders, residents of the township, town or ward, they shall direct a permit to be issued under the hand and seal of their county auditor, and delivered to the person named in such permit, upon the executing and properly acknowledging, before an officer authorized to take acknowledgments of deeds, a bond pay-

able to the State of Indiana, in the sum of three thousand dollars, with not less than two freeholders as security, conditioned for the payment of all fines, penalties and forfeitures incurred by reason of the violation of any of the provisions of the act passed by the legislature of our State, and approved February 27, 1873, to regulate the sale of intoxicating liquor, &c. And it is further provided, that it must contain a condition that the principal and sureties shall be jointly and severally liable, and shall pay to any person or persons, any and all damages which shall or may be suffered or inflicted upon any person or persons, either in person or property, or means of support, by reason of any sale or sales of intoxicating liquor, by any person receiving such permit, or by his agent or employees.

BOND.

We, A, B and C, all of Vermillion county, State of Indiana, are held and firmly bound unto the State of Indiana in the penal sum of three thousand dollars, which we jointly and severally well and truly promise to pay, dated this —— day of ———, 187–. The conditions of the above obligation are such that whereas, the said A has made application to the Board of Commissioners of the county of Vermillion, for a permit to sell intoxicationg liquors on lot No. 71, block No. 2, in the incorporated town of Newport, Vermillion county, Indiana, and for the privilege of allowing the same to be drank on said premises; and whereas the board of commissioners are about to issue to the said A such permit, now if the said A shall well and truly pay off any and all fines, penalties and forfeitures incurred by reason of the violation of any of the provisions of the Temperance Act entitled "an act to regulate the sale of intoxicating liquors, to provide against evils resulting from any sale thereof, to furnish remedies for damages suffered for any person in consequence of such sale, prescribing penalties, to repeal all laws contravening the provisions of this act, and declaring an emergency;" approved February 27, 1873, and conditioned further that the principal and sureties herein named shall be jointly and severally

liable, and shall pay to any person or persons any and all damages which shall in any manner be suffered by or inflicted upon any such person or persons, either in person or property, or means of support, by reason of any sale or sales of intoxicating liquors to any person by the said A, or by any of his agents or employees, then this obligation to be void; else to remain in full force and virtue in law.

A, [SEAL.]
B, [SEAL.]
C, [SEAL.]

The bond must be acknowledged before some person authorized by law to take acknowledgement of deeds.

The following form may be used:

STATE OF INDIANA, }
Vermillion County, } ss.

Before the undersigned, a justice of the peace in and for the county and State aforesaid, on this —— day of ——, 187—, the within named A., the principal, and B. & C., sureties of foregoing bond, acknowledged the execution thereof.

Witness my hand and —— seal, this —— day of ——, 187—. JOHN JONES, J. P. [SEAL.]

This bond must be approved by the board, which approval should be in or attached to the bond.

The following form may be used:

Accepted and approved this —— day of ——, 187—.

G., W., L., } *Com'rs of Vermillion County, Indiana.*

After such bond has been approved by the board it must be filed in the Auditor's office, and must be recorded by such Auditor forthwith in a book prepared for that purpose, and shall there remain for the use of the State of Indiana, and for the use of any persons, &c.

The commissioners, before approving the bond, should make inquiry into the financial standing and worth of the

sureties. They must be freeholders, and should be worth over and above all indebtedness an amount greatly in excess over penalty of the bond. To do this they may call to their aid any paper, deeds, records, books, maps or charts. And may summons witnesses and examine them under oath touching the value of their property, or they can examine the sureties in reference to the same. They should not be unreasonable in their demands, but they should see that the bondsmen are responsible to the full amount of the bond.

From the general reading of this act one would be led to believe that the proceedings on the part of an individual to obtain a permit to sell intoxicating liquors was intended by our law-makers to be an *ex parte* proceeding, and that no resistance could be made to the granting of the permit by the Board of Commissioners; and we think this is true to some extent, but the applicant is required to file his petition with the county auditor twenty days before his case can be heard. This is evidently intended as a notice to the public, and certainly contemplates a defense. It is provided by section five of the Temperance act, "that if any person holding a permit shall be convicted of a violation of any of the provisions of said act that such conviction shall work a forfeiture of his permit and of all rights under the same, and that no permit shall thereafter be granted to such person before the expiration of five years from the date of such conviction.(*m*)

From the reading of these two sections it is evident that any citizen of any ward, town, or township may come in and resist the application: 1st. On account of the insufficiency of the petition. 2d. That the petition has not been signed by the majority of legal voters of the ward, town, or township. 3d. That the applicant has been convicted of a violation of some of the provisions of the Temperance act. 4th. That the signers are not all legal voters and residents of the proper county. If the petition has not been filed twenty days before the meeting of the board,

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(*m*) Act of 1873, p. 154, sec. 5.

they should continue the application until next term, at which time it should be considered. The board should make a complete record of their proceedings in such cases.

The following form may be used:

September Term, 1873, *of the Board of Commissioners of the County of Vermillion:*

Application of A for a permit to sell intoxicating liquors in Newport.

Be it remembered, that on the —— day of July, 1873, A filed with the Auditor of Vermillion county, Indiana, a petition signed by the said A and one hundred resident legal voters of the incorporated town of Newport, said county, praying this board to grant the said A a permit to sell intoxicating liquor on lot No. 71, Block No. 2, in the incorporated town of Newport, in said county, with the privilege of allowing the same drank on said premises. The said A at the same time filed with the auditor of said county a bond, made payable to the State of Indiana, in the penal sum of three thousand dollars, which bond was signed by the said A and B and C as his securities, as required by law, which bond was approved and accepted by this board. And after a careful examination of said petition and hearing the evidence offered in support of it, we are satisfied that the same is in proper form, and that it had been signed by the majority of legal voters, residents of the incorporated town of Newport, being satisfied that the said A has complied in every respect with the requirement of the law. It is therefore ordered, directed, and decreed by the Board that a permit be issued and delivered to the said A under the hand and seal of the Auditor of Vermillion County, Indiana, authorizing him to sell intoxicating liquors on lot No. 71, block No. 2, in the incorporated town of Newport, with the privilege of allowing the same to be drank on said premises; that said permit be dated on this 3d day of September, 1873, and to expire on 3d day of September, 1874.

S.,
R.,
B.,} *Comm'rs of Vermillion Co.*

After the granting of the permit by the Board, the Auditor must issue and deliver to him under his hand and official seal a certificate of the same.

The following may be used:

STATE OF INDIANA, }
Vermillion County. } ss:

This certifies, that permit has been granted by the Board of Commissioners of Vermillion County, Indiana, to A, for one year, from the 3d day of September, 1873, to sell intoxicating liquors in a less quantity than a quart at a time (with the privilege of allowing the same to be drank upon his premises), at his place of business in said county, and at such place of business only, viz: lot No. 71, block No. 2, in the incorporated town of Newport, in Vermillion Township, in the county aforesaid, subject to the restrictions and under the provisions of "an act to regulate the sale of intoxicating liquors, to provide against evils resulting from any sale thereof, to furnish remedies for damages suffered for any person in consequence of such sale, prescribing penalties, to repeal all laws contravening the provisions of this act, and declaring an emergency;" approved February 27, 1873.

In testimony whereof, I hereunto set my hand and affix the seal of the Board of Commissioners of said county, this 3d day of September, 1873.

[Seal.] J—— T——,
Auditor of Vermillion County.

In case the amount of the bond shall be exhausted by recovery thereon, a new bond must be filed in ten days, or the seller forfeits his license. The new bond must be like the old one, with additional security, and must be approved by the Board, and filed and recorded like the old one.

The Auditor must furnish the person to whom the permit is granted a copy of the order of the Commissioners granting the permit, which copy must show in conspicuous letters the date of the commencement of such permit and

of its expiration. This copy must be hung up by the grocery keeper in his grocery, in a place where it can be seen and read by anyone who may desire so to do.

CHAPTER XIV.

TOWNS.

Vacation of Streets and Alleys, Common, Public Square, or part thereof, in any Incorporated Town in this State.

It is provided by the statute that, "Whenever any person or corporation interested in any real estate in this State, laid out in streets and lots as a town, may desire to vacate any lot, street, alley, common, public square, or part thereof, in such town or plan of town,(*n*) such person or corporation may petition the Board of County Commissioners for the proper county, giving a distinct description of the property to be vacated, and the names of the persons effected thereby The petition must be filed with the County Auditor thirty days before the meeting of the Board.

PETITION.

To the Honorable Board of Commissioners of Vermillion Co.:

The undersigned, your petitioner, would represent to your Honors that he is the owner of lot No. 72, in the town of Eugene in said county; that part of his said lot is laid out in an alley; that said alley lays between lots 72, aforesaid, and lot No. 73, in said town; that said alley passes over the land of your petitioner and one S. L., and that the said S. L. and your petitioner are the only persons to be effected by the vacation of said alley. He therefore prays your Honors to vacate and abolish said alley. T. J.

Notice of the pendency of the petition must be given for

(*n*) 1 G. & H., p. 632.

thirty days in a public newspaper printed in the county where the suit is pending, if any paper is published in the same, and by written notices, set up in three of the most public places near the alleys, streets, lots or squares proposed to be vacated.

Form of Notice:

Notice is hereby given that there is a petition now on file in the county auditor's office, praying for the vacation of the alley lying between lots No. 72 and 73, in the town of Eugene, Vermillion county, Indiana, and that said petition will be presented to the board for final action, at their June session, 1873. Said alley proposed to be vacated passes over the land owned by T. J. and S. L., and they are the only persons to be affected by said vacation.

T. J.

At the time set for the hearing of the petition take a copy of your notice and go before the board and establish, either by written or parol evidence, that you are the owner of land in the town in which you propose to vacate the alley, &c., &c. Then prove you stuck up your notice in three public places near the alley, lot, street or square proposed to be vacated. Show the exact day the notices were stuck up, and then, after showing that the copy is an exact copy of the notice posted up by you, introduce your copy in evidence. If you gave notice by publication, produce the affidavit of the printer as to the time of publication. After you have done this, if no opposition be made to such petition, the board of commissioners may vacate it, with such restrictions as they may deem for the public good. But if any one appears before the board and objects to such vacation, the board must continue the cause until the next term of the board, when, if the objector will consent to such vacation, the board must enter an order vacating the same; but if the consent of the objector can not be obtained, if the petitioner can get two-thirds of the real estate holders of the town to petition for the vacation of the same, the board must grant the prayer of he peti-

tion, and must vacate the alley, street, &c., and must enter an order to that effect of record. But no vacation of a street or alley shall take place unless the consent of the persons owning the property immediately adjoining thereto be obtained thereof in writing, which consent shall be acknowledged before some justice of the peace and filed with said board.

Form of consent:

I, S. L., do hereby consent to the vacation of the alley between lots No. 72 and 73, in the town of Eugene, Vermillion county, Indiana. S. L.

STATE OF INDIANA, }
Vermillion County. } ss:

Before the undersigned, a justice of the peace in and for the county and State aforesaid, on this 17th day of May, 1873, personally came S. L. and acknowledged the execution of the above instrument.

J. S., *J. P.* [SEAL.]

The above forms can be used in the case of the vacation of streets, lots and public squares, with a slight variation. In drafting your petition and giving notice, be careful to get the right description of the lots and the names of the true owners.

The board of commissioners may change the name of any town in their county on petition praying for the same, signed by the majority of the qualified voters of said town.(*k*)

Form for Petition:

To the Honorable Board of Commis'ers of Vermillion County:

We, the undersigned, residents and legal voters of the town of Eugene, in Vermillion county, Indiana, would respectfully represent to your honors that we believe that the interest of the citizens of said town will be promoted by

(*k*) 1 G. & H. p. 633, sec. 11.

the change in the name of said town, for the reason that there is another town in Clarke county, Indiana, of the same name. We therefore pray your honors to change the name of said town from Eugene to that of Nilson, and we will ever pray.

Get the majority of the qualified voters living in said town to sign your petition, take it and go before the board while in regular session, file your petition with the auditor, and then make proof that the petition has been signed by the majority of legal voters of the town you desire to change the name of. After this is done the board will make an order changing the name of such town, and publish the notice as required by law.

CHAPTER XV.

Private Roads—how Laid Out, Changed and Vacated.

It is provided by the act approved March 9, 1861, that any person or persons may have a private road laid out, changed or vacated upon presenting a petition praying therefor, signed by the person or persons, asking for the same, to the board of commissioners of the county in which such petitioner or petitioners may reside, under the same regulations now provided by law for the location, change or vacation of a public highway, so far as such regulations are or may be applicable.

Form of Petition for Private Road.

To the Honorable Board of Commissioners of the County of Vermillion:

The undersigned would represent to your honors that he is a resident freeholder of said county; and that he owns the south-east quarter of section 7, township 17 north, range 10 west, in Vermillion county, Indiana; and that one Hugh Cook is the owner of the south-west quarter of section 8, township and range aforesaid. And he would further rep-

resent that there is a public highway leading from Perrysville to the town of Eugene, that runs on the east side of Hugh Cook's tract of land above described, and that this is the only highway that is convenient for your petitioner to travel to either of said towns; that unless he has a passway over the land of Hugh Cook, he will be greatly discommoded and troubled in getting from his residence to either of said towns. Your petitioner would therefore pray your honors to lay out and establish for him a private way, twenty feet wide across said tract of land belonging to Hugh Cook, to commence six feet north of the south-west corner of said quarter section, running thence east one-half mile, to the above mentioned highway. Said highway passes over the land of Hugh Cook.

THOMAS REED.

Before presenting your petition to the board for their action thereon, you must give notice of the time and place the petition will be presented to the board, by posting up notices in three of the most public places in the neighborhood of the road for at least twenty days before the meeting of the board at which you intend to present your petition, or you may publish such notice for three weeks successively in a newspaper published in the county. After you have given the required notice, take your petition and a copy of your notice with you, and go before the board; hand your petition to the auditor of the county, and tell him to mark it filed. Then introduce yourself or some one else as a witness, and prove that the notices were stuck up at the proper places and in time; prove also that the copy that you have is a correct copy of the ones you stuck up, and then introduce it in evidence. You must show, also, that the road will pass over the land of the individual that you allege to be the owner in your petition. If there is no remonstrance filed against the laying out of said road, the board must enter an order granting the prayer of the petition, and order the road to be opened and kept in repair at the expense of the petitioner or petitioners.

Form of Notice.

Notice is hereby given, that there will be a petition pre-

sented to the board of commissioners of the county of Vermillion, at their June session, 1873, asking for the laying out and establishing a private way on the following route: Commencing six feet north from the north-west corner of the south-west quarter of section 8, township 17 north, range 10 west, in Vermillion county, Indiana, running thence east one-half mile to the Perrysville and Eugene road. Said private way will pass over the land owned by Hugh Cook.

THOMAS REED.

As to change and vacation of private ways and remonstrance, see ante-page 186, of this work, under the head of highways running through but one county. And the forms there given can be used with a slight change in cases of this character. In cases of private ways, the county has no damages, but all the costs must come out of the pockets of the petitioner. If there are viewers appointed by the board to assess the damages that the citizen or citizens may sustain by reason of the location of the road, and the viewers report in favor of damages, the board should order the private way opened if the petitioner will pay the damages and open the road at his own expense.(*r*)

CHAPTER XVI.

Macadamized, Gravel and Plank Roads—how Established.

It is provided by the act approved March 6th, 1865, that any number of persons owning more than three-fifths of the amount of any real estate, as shown by the book of the county auditor, or counties in which the proposed road is to be constructed, wish to construct a Macadamized, gravel or plank road, they must get up a written petition to the county board, or counties, as the case may be, stating in their petition their desire to form such a road, giving the starting point and terminus, the distance in miles, the route they

(*r*) Act of 1861, p. 131, regular session. An order by the county board authorizing the opening of a private way, without defining its width, is void on its face. Barnard *et al.*, v. Haworth, 16 Ind., 103.

propose to construct said road upon. If the board shall deem the proposed road of public utility, they shall grant the applicants the right of the highway petitioned for, to be the property of the association. The persons, after receiving the permit from the county board, may organize themselves into a corporation, and elect such officers and make such by-laws and rules for their action as they may deem right and proper, not inconsistent with the power conferred upon them by the statute.

The road must be five miles in length; and all real estate three-fourths of a mile each side of the proposed road shall be taxed to construct said road—each tract of land to be taxed in proportion to the appraisement that may be on the auditor's books at the time of the organization, except real estate inside the limits of an incorporated town, which is not subject to taxation for such purpose. After the company have organized, the board of commissioners of the proper county must appoint a suitable person to estimate the grading, graveling or planking, as the case may be; the length of the proposed road within the prescribed limits, as shown by the books of the county auditor; to audit the amount of each owner's tax and place it in the hands of the treasurer to be collected as other tax. The person so appointed shall take an oath to perform his duty to the best of his ability. The rate per cent. of taxation must be estimated on the appraised value of the land as appears on the auditor's books of the proper county at the time of the organization of the company. The first thing that should be done where a road of this kind is to be established, is to get up the petition.

Form of Petition.

To the Honorable Board of Commissioners of the County of Vermillion:

We, the undersigned, would represent unto your honors that we are the owners of more than three-fifths of the amount of real estate lying three-fourths of one mile on each side of that part of the public highway known as the

Acts of regular session, 1865, p. 90.

Newport and Eugene road that lies between the north end of the bridge across the Little Vermillion, running at Newport, and the south end of the bridge across the Big Vermillion river at Eugene, all in Vermillion county, Indiana. We would further represent to your honors that we desire to build a gravel road from one of said bridges to the other, a distance of seven miles; to commence at the north end of the bridge at Newport aforesaid, and to terminate at the south end of the aforesaid bridge at Eugene. We therefore pray your honors to grant us the right of said highway, to be used and held by us as our property for the purposes aforesaid.

C., A.,
D., B.,
F., M.

Take this petition and go before the board at some regular session, and show to the satisfaction of its members, by the certificate of the proper county auditor, that the petitioners own the land as set out in their petition, and they will grant the right of way.

It is provided by the act approved March 11, 1867, that any plank, Macadamized or gravel road company organized under the act approved May 12, 1852, which has a subscription of eight hundred dollars per mile of road, and not having a sufficient amount for the construction of their road, they may petition the board of commissioners of the county or counties through which the proposed road is or or may be located, for the appointment of disinterested freeholders of the county or counties, to assess the amount of benefit to each tract of land in one and one-half mile of such road on either side, or within the like distance of the terminus thereof. On the filing of this petition and proving that they have eight hundred dollars per mile of subscription, the board must appoint the assessors, and cause the auditor of the county to notify them of their appointment and of their duties under such appointment, and to fix a time and place for their meeting before proceeding

to the discharge of their duties.(*y*) In all cases of this kind the board should be careful to comply with the letter and spirit of the law.

CHAPTER XVII.

County Seats—Relocation of—How Accomplished.

The act approved Feb. 24, 1869, provides that whenever fifty-five per cent. of the legal voters of any county in this State shall, by written petition request the board of commissioners of their county to relocate the county seat of such county, designating in such petition the site where such relocation is desired, and shall procure the conveyance to such board by deed conveying good title of two lots of ground, one containing not less than two acres as a site for the court house, and the other containing not less than one-fourth of an acre as a site for the county jail, to be held by such board for that purpose, and shall deposite with such board the sum of one hundred dollars to pay an architect, and one hundred and fifty dollars to pay commissioners to assess damages, then such board shall proceed to have new county buildings erected thereon, and the county seat removed thereto, in the manner and upon the conditions set forth in the following section: *Provided*, That no such relocation of a county seat shall be made unless it shall be removed at least three miles.

If such petitioners, or some of them, shall, within three months after such estimates and plans are presented, cause to be paid into the county treasury, or the payment thereof secured to such board to their satisfaction, a sum equal to the value of the real property belonging to the county at the then county seat, then such board shall at once cause the auditor to advertise immediately in the newspapers of

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(*y*) Act 1867, p. 167; 23 Ind. 353; 26 Ind. 53; 28 Ind. 382; 22 Ind. 484; 26 Ind. 119; 30 Ind. 311; *id.* 309; 18 Ind. 101; 30 Ind. 226; 18 Ind. 244; 23 Ind. 623.

such county, if any there be, or if none, then in the nearest newspaper of general circulation, and by posting in six public places in said county, for sealed proposals for the erection of such buildings according to said plans and specifications; such proposals to be presented to the board at its next regular session.

To ascertain and fix the amount and value of the real property of any county at the county seat, it shall be the duty of the county board of any county before whom a petition shall be filed, as provided in the first section of this act, to direct the auditor of said county to notify the Governor of the State of the filing of the same, who shall, upon the reception of said notice, appoint three disinterested persons, non-residents of said county, as commissioners, to examine said real estate at said county seat, and assess the value thereof; and to enable them so to do, they shall meet at said county seat on a day whereof public notice shall be given, and they may examine competent witnesses as to such value, and after they, or a majority of them have agreed, they shall make out duplicate statements of such action and conclusion, and file one copy with the auditor of said county, and transmit by mail the other copy to the Governor of the State.

Appeals—How Taken.

It is provided by the statute that:

31. From all decisions of such commissioners there shall be allowed an appeal to the circuit or common pleas court, by any person aggrieved; but if such person shall not be a party to the proceeding such appeal shall not be allowed, unless he shall file in the office of the county auditor his affidavit setting forth that he has an interest in the matter decided, and that he is aggrieved by such decision, alleging explicitly the nature of his interest.

32. Such appeal shall be taken within thirty days after the time such decision was made, by the appellant filing with the county auditor a bond with sufficient penalty and sureties, to be approved by said auditor, with condition for

the due prosecution of such appeal, and the payment of all costs, if the same shall be adjudged against said appellant.

33. Within twenty days after the filing of such appeal bond, the auditor shall make out a complete transcript of the proceeding of said board, relating to the proceeding appealed from, and shall deliver the same, and all the papers and documents filed in such proceeding, and the appeal bond, to the clerk of the court to which the appeal is taken.

34. When such appeal is taken by a person not a party to the proceeding, or when such appeal is taken in vacation, the appellant, if there be an appellee, shall cause a summons to be sued out of the clerk's office of the court to which the appeal is taken, returnable on the first day of any term of such court next after the the date thereof, requiring the appellee to appear and answer said appeal, which summons shall be issued and served as other similar process.

35. If such appeal shall be filed, and such summons, when necessary, served ten days before the first day of the court next after such appeal, such cause shall stand for trial at such term; otherwise it shall be continued until the next term of the court.

36. All appeals thus taken to the circuit or common pleas court shall be docketed among the other causes pending therein, and the same shall be heard, tried and determined as an original cause.

37. Such court may make a final determination of the proceeding thus appealed, and cause the same to be executed, or may send the same down to such board, with an order how to proceed, and may require such board to comply with the final determination made by such court in the premises.(*s*)

In our comment on the law governing appeals from the Board of Commissioners to the higher courts, we shall take up each section of the statute and comment upon them

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(*s*) 1 G. & H. 253, secs. 31, 32, 33, 34, 35, 36, 37.

separately. We will commence with section 31 *supra*. This section is quite comprehensive, and if taken in its broadest sense would authorize an appeal from any decision made by the Board; for it says, *from all decisions*, but the words, *all decisions*, as used in this section, must be taken in a qualified sense. The Board of Commissioners are clothed with a two-fold power, legislative and judicial. From their decisions when sitting and voting as a legislative body no appeal will lie; but an appeal may be taken from all their judicial decisions. But if they exceed their authority while acting as a legislative body, their acts will be void and an appeal will lie to the higher courts.(*a*) To undertake to draw the lines of distinction between their legislative and judicial acts, is a task not free from difficulty; but we shall attempt to do so. A legislative act of the Board is one that operates upon all the persons or property or both in a township or townships, or on the persons or property or both of the entire county alike. A judicial act of the Board is a decision upon some question presented to them which applies only to some particular person or persons, and binds no others. We think that all decisions of the Board on questions arising in cases where the statute contemplates an adverse party, may be appealed from. Our Supreme court in the case of Hanna v. the Board of Commissioners of Putnam county, *supra*, say, in commenting on this section: "The language authorizing an appeal is comprehensive, and was undoubtedly intended to include all actions of the Commissioners not strictly within the limits of local legislative power conferred by the statute. For the purpose of authorizing an appeal the word *decision* will be applied to any ruling *final* in its nature upon any subject upon which the Board of County Commissioners are not authorized to take legislative action."

This section authorizes an appeal by any person who may feel aggrieved by the decision of the Board. The word aggrieved in this section means injured or wronged. If a person, therefore, feels injured by the decision of the

(*a*) Hanna v. Board of Commissioners of Putnam county, 29, Indiana, 170.

Board, he may appeal from that decision to the Circuit Court; but if the person appealing was not a party to the proceeding before the Board, he cannot appeal unless he files in the office of the county Auditor his affidavit, showing that he has an interest in the matter decided, and that he is aggrieved by such decision, alleging explicitly the nature of his or her interest. It would not be sufficient to state in his affidavit that he was interested, but the nature of his interest must be shown.(*t*) We are of the opinion that any person or persons who are made adverse parties by the pleadings, and have been summoned to answer another, and appears or fails to attend and is defaulted, may appeal from the decision of the Board, without affidavit, to the Circuit Court, by filing his bond in thirty days. So when a person has been constructively summoned (by advertisement in a newspaper or by posting up notices, etc,) in common with other citizens, and appears and makes himself a party of record, he may appeal without affidavit. But in all other cases not coming under these two exceptions, the appeal can only be granted on affidavit showing interest.

Affidavit for an appeal:

STATE OF INDIANA, }
Vermillion County. } ss:

John Smith being duly sworn upon his oath says: "That the Board of Commissioners of Vermillion county did, at their regular June session for the year 1873, on the third day of said term, it being the fourth day of said month, did pass and enter an order of record, appropriating six thousand dollars of the money belonging to the public funds of said county, to the Farmers' Home Institute, to enable said corporation to increase its stock of books. A copy of said decree is filled herewith and made a part of this affidavit." The affiant, John Smith says that he is a resident tax-payer of said county, and has been for seven years

(*t*) Fordyce v. The Board of Commissioners of Montgomery county, 28, Ind., 454—13, Ind., 247—25, Ind., 333.

past, and that he was not a party to the proceeding of the Board in making said appropriation, and that the action of the Board of Commissioners of Vermillion county in making the appropriation aforesaid was illegal and without authority of law, that he, as a tax-payer of said county, is aggrieved by the action of the Board in making said appropriation, he therefore asks an appeal from said order to the Circuit Court. JOHN SMITH.

Subscribed and sworn to before me this June 29, 1873.
[Seal.] J. T., Auditor of Vermillion county.

Form of Bond:

The undersigned are held and firmly bound to the Board of Commissioners of the county of Vermillion, and to the Farmers' Home Institute in the penal sum of five hundred dollars, on this condition, to-wit: The undersigned, John Smith, having this day appealed from an order of the Board of Commissioners of the county of Vermillion, made on the fourth day of June, 1873, by which the said Board donated to the Farmers' Home Institute, six thousand dollars of the public money, belonging to Vermillion county. Now if the said John Smith shall duly prosecute his said appeal and pay all costs that shall be assessed against him, then this bond to be void, else to remain in full force.

THOMAS SMITH,
RICHARD ROE.

Taken and approved by me this 29th day of June, 1873.
[Seal.] J. T., Auditor of Vermillion county.

In making out your appeal bond in cases where there has been more than one order of the Board, you should be careful to let the bond show from what order you appeal. To illustrate. Suppose you are appealing from the proceeding of the Board in locating and establishing a highway, the Board in such cases generally enter an order fixing the amount of damages, and an order establishing the road. You can appeal from either or both orders, but if you wish to appeal from one only, you must have your bond to show that fact, or if you appeal from both let your

bond so state.(*g*) It is sometimes quite difficult to tell who should be made appellees in such cases. But the statutory rule in reference to parties defendants is a safe one to follow: That all parties who claims an interest in the controversy adverse to the appellant, or who is a necessary party to a complete determination or settlement of the question involved, should be made appellees. Where there is more than one party, either plaintiff or defendant, in a cause before the Board, and one or more of them may appeal. The appeal must be taken in thirty days from the time the decision was made. For computation of time see ante page ——

If you desire to appeal, you must take your bond and affidavit (when one is required,) and go to the proper auditor's office in thirty days from the time the decision was rendered, and file the same with him, and inform him you desire to take an appeal to the circuit court. He must approve the bond if he thinks the security good. On doing this, the law makes it his duty to make out within twenty days after filing such appeal bond, a complete transcript of the proceedings of said board relating to the proceeding appealed from, and shall deliver the same and all papers and documents filed in such proceeding, and the appeal bond, to the clerk of the court to which the appeal is taken. Both the appellant and the security must sign the bond. After the auditor has made out his transcript, he should annex to the bottom of it a certificate that the same is a true and complete transcript of all the proceedings had before the board in the above entitled cause. Transcript means what is recorded in the case.

Certificate to Transcript.

I, James T., auditor of Vermillion county, Indiana, do hereby certify that the above and foregoing is a complete transcript of all the proceedings before the board of com-

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(*g*) Wright and another, and Wells and others, 27, Indiana, 65.

An appeal suspends the operation of all orders appealed from Molihan v. State, 30 Ind 266. Young v. the State, 34 Ind., 46.

missioners of the county of Vermillion in the above entitled cause, as taken and copied from the record of said board.

In witness whereof I have hereunto set my hand, and affixed my official seal, this — day of ——, 187–.

[SEAL.]

JAMES T.,
Auditor of Vermillion County.

The filing of the appeal bond suspends the order appealed from.

If the county auditor fails to send up the papers in proper time, the appellant may move the court and obtain a mandamus against him to send up the papers.(*n*) If a party presents a claim against the county to the board, and they fail to allow it, or allow a part and refuse to allow the remainder, he may appeal from their decision to the circuit court, or may bring his action against the board.(*o*) But if he recovers less judgment in the court above than was allowed him by the board, he must pay the costs of the appeal.(*p*)

(*n*) 4 Blackford 176. (*o*) 15 Ind. 147; 22 Ind. 187; 20 Ind. 178. (*p*) 15 Ind. 181.

See on questions of appeals: 31 Ind. 51; 16 Ind. 15; 30 Ind. 266; 34 Ind. 46; 31 Ind. 505; 4 Black. 116; 5 Black. 594; 8 Black. 62; 31 Ind. 248; 29 Ind. 170; 28 Ind. 454; 25 Ind. 333; 8 Ind. 522; 23 Ind. 518; 6 Ind. 392; 15 Ind. 14; 22 Ind. 187; 20 Ind. 178; 15 Ind. 181; 7 Ind. 187; 1 Ind. 79; 1 Blackford 4.

PART SECOND.

CHAPTER XVIII.

ANIMALS KILLED OR INJURED BY LOCOMOTIVE, CARS, ETC. FORMS FOR NOTES, BONDS, AGREEMENTS, DEEDS, ETC.

AN ACT to provide compensation to the owners of animals killed or injured by the cars, locomotives, or other carriages of any Railroad company in this State, and to enforce the collection of judgments rendered on account of the same, and to appeal all laws inconsistent therewith.

[Approved March 4, 1863.]

Section 1. *Be it enacted by the General Assembly of the State of Indiana,* That lessees, assignees, receivers, and other persons, running or controlling any railroad, in the corporate name of such company, shall be liable, jointly or severally with such company, for stock killed or injured by the locomotives, cars, or other carriages of such company, to the extent and according to the provisions of this act.

Sec. 2. That whenever any animal or animals shall be or shall have been killed or injured by the locomotives, cars, or other carriages used on any railroad in, or running into or through this State, whether the same may be or may have been run and controlled by the company, or by the lessee, assignee, receiver or other person, the owner thereof may go before some justice of the peace of the county in which such killing or injuring occurred, and file his complaint in writing, and such justice shall fix a day to hear said complaint, and shall cause at least ten days' notice to be served on the railroad company, by the service of a summons by copy on any conductor of any train passing into or through said county, but in all cases when the value of any animal or animals so killed, or the injury done shall exceed fifty dollars, the owner or owners of any such animal or animals, may file his or their complaint, and prose-

cute his or their claim before such justice of the peace, in the court of common pleas, or in the circuit court of the county, at his or their option.

SEC. 3. When such complaint shall be filed in the court of common pleas, or in the circuit court, the clerk of said court shall issue a summons thereon as in other cases, which summons shall be served by the sheriff on the railroad company defendant, at least ten days before the first day of the term, at which such cause is to be heard, and such summons may be served by copy on any conductor on any train on said road passing into or through said county.

SEC. 4. The action may, in all cases contemplated by this act, be brought against the railroad as defendants, whether the same is or was being run by the company or by lessee, assignee, receiver or other person in the name of such company.

SEC. 5. On the hearing of any such cause, the court or jury trying the same shall give judgment for the plaintiff or plaintiffs, for the value of the animal or animals killed or the injury done, without regard to the question whether such killing or injury was the result of wilful misconduct, or negligence, or the result of unavoidable accident; and if such cause be commenced in the common pleas or circuit court of the county in which such animal or animals are killed, or such injury done, the court shall, on motion of the plaintiff or plaintiffs, on the rendition of such judgment, or afterwards at any time, when notice of such motion has been served on the railroad company defendant, at least ten days before the first day of the term of the court at which such motion is to be heard, order a writ to issue, directed to the sheriff of the proper county, for any conductor, agent, employee of such railroad company, or of the lessees, receivers, or assignee of such company, named in such motion, to appear forthwith, or at such time as the court may direct, and answer upon oath as to the amount of money in their hands, if any, belonging to such company, or to such assignees, lessees, receivers as aforesaid, and also as to the probable amount of money received by such agents, con-

ductors, or employees as aforesaid belonging to such railroad company, lessees, assignees, or receivers as aforesaid; and if such agent, conductor or employee as aforesaid shall answer that he has, or that they have any such money, or are in the constant receipt of money as such agent, conductor, or employee as aforesaid, the court shall order such agent, conductor, or employee as aforesaid, to pay into the clerk's office of such court, at such times as may be named by the court, such portions of the money so held or received as aforesaid, not exceeding one-half the amount thereof, as may be deemed just by the court, until such judgment and costs is fully paid and satisfied.

SEC. 6. Any person obtaining a judgment before a justice of the peace for any animal or animals killed or injured by the cars, locomotives, or other carriages of any railroad in this State, may, upon the filing of a certified transcript of such judgment in the office of the clerk of the common pleas court of the county in which such animal or animals are killed or injured, and upon the clerk of such court entering the same on the order book thereof, may upon notice and motion made in such court, as specified in the fifth section of this act, shall be entitled to the order and proceedings as therein specified.

SEC. 7. This act shall not apply to any railroad securely fenced in, and such fence properly maintained by such company, lessee, assignee, receiver, or other person running the same.

SEC. 8. That any agent, conductor or employee who shall fail, refuse or neglect to perform or obey the orders of the court, as specified in this act, shall be deemed guilty of contempt of the court, and fined in any sum not exceeding five hundred dollars, to which may be added imprisonment in the county jail for a period not exceeding six months.

SEC. 9. All laws or parts of laws in conflict with the provisions of this act, are hereby repealed.

SEC. 10. Whereas, an emergency exists for the immediate taking effect of this act, the same shall be in force and take effect from and after its passage.

CHAPTER XIX.

The Responsibility of Railroad Companies for Stock Killed or Injured by their Locomotives, Cars or other Carriages

It is provided by the act approved March 4th, 1863, that where any animal or animals are killed or injured by any locomotive, cars or other carriage, used on any railroad in, or running into or through this State, the owner of such animals so killed or injured may bring his action for the value of the animal or animals killed, or for the injury done. But if the value of the animal or animals killed will exceed two hundred dollars, or the injury to such animals will exceed that amount, then the action must be brought in the circuit court, as justices of the peace, under our statute, have no jurisdiction in cases where the amount claimed exceeds two hundred dollars, except when judgment is confessed. On filing of the complaint, the justice must set the same down for hearing on a day to be designated by him in the future, the time must be at least ten days from the time of filing the complaint. The justice must issue a summons to the constable commanding him to notify the defendant or defendants of the pendency of the action. The constable must serve this writ ten days before the day set for the trial, by leaving a copy of it with a conductor on any train passing into or through said county, or he may serve the same on the chief officer of the company, if in the county, but if they cannot be found, it can be served on any other officer, director, attorney, or general agent of said company, and the service will be as binding and of the same effect as if the same had been served upon its higher officers.(*t*)

In bringing this action, the ordinary rules for pleading and practice before justices' court should be adhered to by the parties, with a few exceptions. At common law, when a party brought his action to recover for an animal killed or injured by the negligent conduct of another, he had to allege in his complaint that the injury occurred without

(*t*) The Jeffersonville, Madison & Indianapolis Railroad Company v. Dunlap, 29 Ind., 426; Act 1861, p. 78; 2 G. & H., p. 62.

fault or negligence on his part. And if the proof disclosed the fact on the trial that both parties had been negligent, and that the fault did not rest altogether with the defendant, the plaintiff could not recover. But it is provided by this act "that on the hearing of such cause, the court or jury trying the same shall give judgment for the plaintiff or plaintiffs for the value of the animal or animals killed, or the injury done, without regard to the question whether such killing was the result of willful misconduct or negligence, or the result of unavoidable accident. But if the road of the company is securely fenced in, and the fence properly maintained by such company, lessee, assignee receiver, or other person running the same, then the plaintiff cannot recover, unless the company has been guilty of negligence without the fault or negligence of the plaintiff. But our Supreme Court, in the case of Knight, Adm'r v. The T. & W. R. R., held that where the negligence of the plaintiff was so gross as to show a willingness that the animal should be killed, there could be no recovery, though the road was not fenced.(*u*)

The act of 1863 was enacted as a kind of a police regulation, for the benefit of the public, to secure safety and freedom from obstruction to the passage of carriages along the track; and the penalty attached for negligently suffering their road to go unfenced, is the payment to the owner the value of the animal killed, or the damages caused by the injury received.(*v*) If the killing took place at a point where the company could not legally fence their road, they will not be liable under this statute,(*w*) but may be at common law. It is not, however, necessary for the plaintiff to allege in his complaint that the road might have been securely fenced, but was not. If the killing or injury took place where the road could not be securely fenced, that will be purely a matter of defense which the defendant must establish by his evidence, and need not be alleged in the plaintiff's complaint. The plaintiff must show by

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(*u*) 24 Ind., 402; 29 Ind., 426. (*v*) The New Albany & Salem Railroad Co. v. Tilton, 12 Ind., 3—6; Toledo & Wabash Railroad Co. v. Fowler, 22 Ind. 216. (*w*) 30 Ind., 324.

his complaint that his animal has been killed or injured, and that it was done by the railroad company in the county where the suit is brought, and the amount of damages. It should also show the time when the injury occurred.

The following form for complaint may be used:

[No. 1.]

COMPLAINT.

John Jones
v.
Evansville, Terre Haute & Chicago Railway Company.

Before Esq. PARRETT.

John Jones complains of the Evansville, Terre Haute & Chicago Railway Company, and says that the defendant on or about the 24th day of June, 1873, in Vermillion county, Indiana, did then and there with its locomotive and train of cars, running on and over its road through said county, run over and kill one horse belonging to this plaintiff, of the value of one hundred and fifty dollars. And the plaintiff says that where said killing of said horse occurred on said road, that the same was not securely fenced in; he says that by reason of the wrongful act of the defendant in killing his said horse, he has been damaged in the sum of one hundred and fifty dollars, for which he demands judgment.

JOHN JONES.

It has been frequently held under this and similar statutes that all animals killed at each particular time constitute separate and individual causes of action.(*g*) And it is provided by section forty-nine of the code, that when the complaint contains more than one cause of action, each shall be distinctly stated in a separate paragraph and numbered.(*h*) This rule applies to pleadings in justices' court, and where the plaintiff brings his action to recover for animals killed or injured by a railroad company. All animals killed at the same time must be set out in one paragraph. If there has been more than one killing, then he should add as many

(*g*) 24 Ind., 139. (*h*) 2 res. by G. & H., p. 98, sec. 70; 24 Ind., 139; 20 Ind., 430; 30 Ind., 324; 27 Ind., 71.

paragraphs as there has been times of killing. To illustrate, suppose the cars run over and kill your horse to-day; to-morrow your cow is killed in the same way. You bring suit against the company for damages. You must separate your cause of action into two paragraphs, or it will be defective. If animals killed at different times are improperly joined in one paragraph, the plaintiff will be allowed to prove but one cause of action, and a motion to strike out all the allegations of other animals killed at different times from the one first named may be sustained by the justice.

Our Supreme Court, in the case of the Bellefontaine Railroad Company v. Reed, held the following complaint good:

James Reed complains of the Bellefontaine Railway Company, and says, "that the defendant on or about the 13th of July, 1867, at and in said county of Randolph, and State of Indiana, by its locomotive and train of cars, then running on its railroad at a point on its said road in said county where its railroad was not securely fenced, ran over and killed two hogs of the value of fifty dollars, whereof he demands judgment for fifty dollars.(*m*)

"JAMES REED."

At the hour set for trial, the justice must call the case for trial. If the defendant fails to appear, he should be called and defaulted, but if he appears and process has been properly served, the justice should proceed with the trial, unless for good cause shown he think best to postpone the same. The rules for postponing and continuing the cause is the same as in other cases before a Justice of the Peace; either party may have a jury trial if they wish. The defendant need to file pleading as he can show any valid defense under the general denial which the statute always puts in for the defendant in justices' court. The plaintiff must open and close the case; he will, therefore, be allowed to introduce his evidence first. He must show in order to make out his case that the animal was killed by the locomotive or train of cars, or other carriages used on the de-

(*m*) 33 Ind., 473.

fendants road; that the animal so killed was his animal; the time and place of killing. He must show that the animal was killed or injured in the county where the suit was brought; he must show the value of the property killed or the amount of damages he has sustained, by reason of the injury to his animal or animals. The defendant will then be permitted to disprove, overturn and invalidate what the plaintiff has proved. He may show that the road was securely fenced in; he may also show that the killing occurred at a point where the defendant's road could not be legally and securely fenced in. He may show that the animal was worthless, and of no value; he may also show that the plaintiff has been guilty of gross negligence, amounting to a willingness to have his animals killed; or, that the plaintiff was not the owner of the animals.

We have not attempted in this little treatise to give full instructions how to proceed in cases of this kind. Our object has been to furnish forms for complaints in such cases, and to aid Justices of the Peace throughout the State in the discharge of their duties in this kind of case, which are becoming quite numerous. When the value of the animals killed, or when the damages from the injury at any one time exceeds fifty dollars, the plaintiff may bring his action before a Justice of the Peace, or in the Circuit Court, at his option. Where the road is fenced, if the railroad company has been guilty of negligence, and the plaintiff has been without fault, he may recover for the injury done, etc. For further information on this question we refer the reader to our notes.

The Bellefontaine Railway Company vs. Reed. 33 Ind. 476.

Appeal from the Randolph Circuit Court.

DOWNEY, J.—This action was brought before a justice of the peace for the value of two hogs of the appellee, alleged to have been killed by a train of cars on the road of the appellant.

There was a default by the defendant, before the justice of the peace, and judgment, after an assessment of the damages. The company appealed to the circuit court, when there was a trial by jury, finding for the plaintiff, motion for a new trial by the defendant, which was overruled, and judgment on the verdict. The evidence is made part of the record by a bill of exceptions.

The errors assigned are, that the court erred. First, in overruling the motion

for a new trial; second, in overruling the motion in arrest of judgment; third, in giving certain charges to the jury; fourth, in refusing instructions as asked, and modifying the same.

Sixth. The verdict of the jury is not sustained by sufficient evidence.

Seventh. The verdict of the jury is contrary to law.

Eighth. The damages are excessive, as found by the verdict.

It may be remarked, before proceeding to examine the questions on their merits, that the third, fourth, fifth, sixth, seventh, and eighth assignments of error are all embraced in the first. They are each of them a ground for granting a new trial, and are properly assigned as reasons for granting the same, but are not necessary, nor, perhaps, properly specified as assignments of error. The new trial was asked for the reasons:

First. That the verdict was not sustained by sufficient evidence.

Second. The verdict is contrary to law.

Third. The damages are excessive.

Fourth. The court erred in giving instructions one, two, three, and four by the court.

Fifth. The court erred in refusing to give instructions two and three asked by the defendant.

The motion in arrest of judgment was based on the alleged insufficiency of the complaint, and as that goes back to the foundation of the suit, we will examine it first. The complaint alleges that the defendant, on or about the 13th of July, 1867, at and in said county of Randolph, and State of Indiana, by its locomotive and train of cars, then running on its railroad, at a point on its said road in said county, where its railroad track was not securely fenced, ran over and killed two hogs of the plaintiff, of the value of fifty dollars; wherefore, &c.

No specific objection to the complaint is pointed out by counsel for the appellant, and we do not observe any.

The evidence discloses the following state of facts: That the hogs belonged to the plaintiff, and were killed by a train of cars on the defendant's road where it passes over lands owned by the defendant. The tract of land was not inclosed, but there was a fence along the line of the railroad. It was in some places six rails high, and in others four and two rails in hight. At some places it had been thrown down, and openings made through it in this way. In other places it had been removed entirely, and its place supplied with ranks of wood; and then the wood had been taken away in some places, and in others it had been burned away, leaving openings of from two to five rods, some of which had been open for a year, and others had been made more recently.

The Indianapolis, Pittsburg, and Cleveland Railroad Company vs. Mustard. 34 Ind. 50.

Appeal from the Madison Common Pleas.

WORDEN, J.—This was an action by the appellee against the appellant for injuring and killing a cow belonging to the plaintiff, by the engine and cars of the appellant, upon her railroad, where the same was not properly fenced. Trial by the court, finding and judgment for the plaintiff, a motion for a new trial being overruled.

It appears by the evidence that the plaintiff's cow, being upon the railroad track, was struck by the pilot of an engine, and carried or dragged some dis-

tance along the track, and then thrown off; that one of her legs was cut entirely off, except a small portion of the skin, and another leg broken; and that she was so badly injured that she could not recover. She lay in this condition a day or two, when the plaintiff killed her, but did nothing further with her, and she was afterwards buried by the employees of the defendant.

During the progress of the trial, the defendant, for the purpose of "fixing the damages," offered to prove the value of the cow after she was struck, but the testimony being objected to, it was excluded. Under the circumstances, we cannot say that this was error.

The plaintiff, out of motives of humanity, doubtless, and to end her misery, killed the cow, but received no benefit whatever from her defunct carcass; and then she was taken charge of by an employee of the defendant, who performed her final obsequies by consigning her to the earth, where she could be a source of profit to no one. Had the plaintiff received some benefit from the cow after she was hurt or killed, the question would have been a different one.

We take it to be quite clear on principle, that if the railroad company, or any private individual, kill the animal of another, under circumstances that render the company or the individual liable therefor, rule of damages will be the value of the animal, unless the case calls for vindictive or punitory damages; and these damages are not to be diminished by the value of the dead animal, unless the owner thereof in some way derives an actual benefit therefrom, or does some act evincing an election to appropriate the dead animal to himself. A man whose animal is wrongfully killed is not obliged to take the dead animal in part payment for the living one.

We regard the case before us as substantially one of killing. The cow must have died from her injuries and the defendant is responsible for her full value. We have examined the evidence in the cause, and are satisfied that the finding of the court, in respect to the damages assessed, and also in respect to the liability of the defendant, accords with the preponderance thereof.

The judgment below is affirmed, with costs and five per cent. damages.

The Jeffersonville, Madison, and Indianapolis Railroad Company v. Parkhurst. 34 Ind. 501.

Appeal from the Johnson Common Pleas.

PETTIT, C. J.—This suit was brought before a justice of the peace, by the appellee against the appellant, for killing a cow by its train of cars. There was a judgment for the appellee before the justice, and appellant appealed to the said court of common pleas. Trial, and judgment for appellee in that court, from which it is brought to this court by the appellant.

The errors assigned in the record are, first, that the court erred in giving instructions one, two, three, four, five and six, excepted to by appellant; second, the court erred in refusing to give instruction one, asked by appellant, and ex-excepted to; third, that the verdict was contrary to the evidence; fourth, that the court overruled the motion of appellant for a new trial; fifth, the court overruled demurrers to the first and second paragraphs of the complaint.

Upon the saying, that the first shall be last and the last shall be first, we will commence with the last assignment; and upon this, it is enough to say, that as no objection in any form was taken to these paragraphs in the common pleas

court, though they were demurred to before the justice of the peace, and the demurrer by that officer overruled; we cannot inquire as to their sufficiency. We cannot reverse, affirm, or modify the rulings or judgment of a justice of the peace, brought before us in this form. We can only take notice of the proceedings of the court of common pleas.

As to the fourth assignment, we think there was no error in overruling the motion for a new trial.

As to the third assignment, we have only to say, that it is not known to our law or practice as an assignment of error, and can only be regarded as an argument or reason under the fourth assignment of error.

As to the second assignment of error—refusing to give instruction asked, which was as follows: "If the jury find, from the evidence, that the cow in question came upon the railroad track, and was killed, within the corporate limits of the city of Franklin, then the plaintiff cannot recover on the first paragraph of the complaint herein;" there was no error in refusing to give this asked instruction. The Indianapolis and Cincinnati R. R. Co. vs. Parker, 29 Ind. 471, and cases cited there.

The first assignment of error is the giving of instructions, which are as follows:

"1st. This is an action by the plaintiff against the defendant, to recover damages for the killing of a cow on the track of the defendant in Johnson county, and the plaintiff sets up in his complaint two grounds of recovery.

"2d. The first paragraph of the complaint alleges that the cow was killed at a point on the railroad where it was the duty of the defendant to fence against stock, and that the defendant had not so fenced in her track, by reason of which the cow strayed upon the track and was killed.

"3d. The second paragraph of the complaint alleges that the defendant so carelessly and negligently ran her locomotive and cars over the road, that the cow was killed by reason of such negligence in the defendant.

"4th. To enable the plaintiff to recover on the first paragraph of the complaint, he must show that the place where the cow strayed upon the railroad was at a point where the company were bound to fence the road, and that such point was not so fenced; or that such point was where the company were bound to maintain a cattle-guard, and that such guard was not in proper condition to keep stock off the track of the road.

"5th. If you should find from the evidence in this case that the place where the cow got on the track was inside the corporate limits of the city of Franklin, you must further find that such place was not at a crossing of any street or alley, or at a point where, from the necessary use of the grounds, it would be unlawful or unreasonable to require the railroad company to maintain a fence, before the road would be liable for not fencing.

"6th. The railroad company would not be bound to erect and maintain cattle-guards at the crossings of the public streets and alleys inside the corporate limits of the city of Franklin, nor would said road be bound to fence the lots lying on either side of her track between the crossings of such streets or alleys over the railroad; but beyond such crossings, the road would be bound to maintain her fences and guards, the same as if running outside the corporation."

We think and hold that there was no error in giving these instructions, and

that they were clearly the law of, and proper in, the case. The appellant could not complain of them.

The judgment is affirmed, with ten per cent. damages and costs.

The Toledo, Logansport, and Burlington Railway Company vs. Nordyke. 27 Ind. 95.

Appeal from the White Common Pleas.

FRAZER, J.—In Hingle vs. The State, 24 Ind. 28, we defined a special statute, in the sense of the 22d and 23d sections of article four of the constitution of the State, to be "such as at common law the courts would not notice, unless it were pleaded and proved, like any other fact." The chief question before us now is, whether so much of the act of March 4th, 1863, (Acts 1863, p. 25) as provides for the enforcement of judgments rendered under the act, is in conflict with the sections of the constitution referred to. This question can only be determined in the negative, if we adhere to the doctrine of Hingle vs. The State. That doctrine is not questioned in the argument; and inasmuch as the subject then received very close attention and consideration, with the aid of a careful and exhaustive argument against the validity of the statute then under consideration, we do not now re-examine it.

In the present case, the proceeding was to enforce the judgment of a justice of the peace. There was no revenue stamp upon the justice's certificate to his transcript. We think that none was required by the act of congress. Prather vs. Pritchard, 26 Ind. 65.

The judgment is affirmed, with costs.

The Indianapolis, Pittsburg, and Cleveland Railroad Company vs. Marshall. 27 Ind. 300.

Appeal from the Marion Circuit Court.

ELLIOTT, J.—Suit by Marshall against the railroad company to recover the value of eleven sheep killed by a locomotive and train of cars of the company, while running on the track of the railroad, said road not being securely fenced at the place where the sheep passed upon the road and were killed.

The railroad was constructed under a special charter granted by the general assembly before the passage of the act of 1853, "to provide compensation to the owners of animals killed or injured by the cars," &c., "of any railroad company in this State."

Trial by the court; finding and judgment for the plaintiff for fifty-five dollars. A motion by the defendant for a new trial was overruled, as was also a motion in arrest of judgment. The case originated before a justice of the peace, and was appealed to the circuit court.

The railroad company is the appellant here. There was no evidence of any negligence or want of care on the part of those having charge of the locomotive and train. The record shows that evidence was given on the trial, that "locomotives and cars, while in motion, cannot be thrown off the track by running over small stock, such as sheep or hogs; that the wheels and machinery of a train will crush through all such animals, without being impeded in any degree, and without endangering the train."

It is claimed by the appellant's counsel that, as the appellant was incorporated

under a special charter, in 1848, containing no provision requiring the company to fence its roadway, or in default thereof making it liable, without regard to the question of negligence, to compensate the owners of animals which might be killed or injured by the trains of said company, the present enactments on that subject can only be sustained, as to the appellant, as a police regulation for the protection of human life, and not for the purpose of compensating the owner of the animals so killed or injured; and, hence, that the law giving compensation for animals so killed or injured on railroads not securely fenced, cannot, as against the appellant, apply to all kinds of animals, but only to those of such size as, when run upon or over, would be liable to endanger the train, or throw the cars off the track, and thereby endanger the lives of persons traveling on such train; that as the evidence in this case showed that no such danger could result from the presence of sheep on the track, the finding and judgment should have been for the appellant.

This is the only question in the case. It has been repeatedly held by this court, that the act in question (Acts 1853, p. 113) is in the nature of a police regulation, the principal object of which is the protection of the lives of passengers. This object is sought to be secured by making railroad companies, whose roads are not securely fenced, liable for all animals killed or injured thereon by their trains, without regard to the question of negligence. This absolute liability is in the nature of a penalty for failing to fence their road. It presents an inducement to railroad companies to fence, by making it their interest to do so, to avoid the penalty. If it be admitted that the law can only be sustained, as against the appellant, as a police regulation, and that the presence of sheep on the track could not possibly endanger the lives of passengers, still the conclusion drawn therefrom by the appellant's counsel does not legitimately follow, and cannot be sustained. As a police regulation for the preservation of human life, it was competent for the law-making power to compel railroad companies to fence their roads, by the imposition of any reasonable penalty that might be deemed necessary to accomplish the object. Indeed, no valid reason is perceived why they might not be prohibited from running trains on unfenced roads, if such a prohibition were deemed necessary. The penalty imposed by the present law is, that when their roads are not securely fenced, railroad companies shall be liable to the owner for the value of animals killed, or for the injury done them, without regard to the question of negligence. No distinction is made as to the kind or size of animals; all are included, or at least all that would be kept from the roadway by a reasonable fence.

In the case at bar, it is not claimed that the road, at the time, was securely fenced against animals of such size as, if run upon or over, would be liable to throw trains off the track, and thereby endanger human life; and without such showing, we think the company is not in a condition to present the question as to whether more is required.

The judgment is affirmed, with costs.

The White Water Valley Railroad Company vs. Quick, 30 Ind., 384.

Appeal from the Franklin Common Pleas.

FRAZIER, J.—This was a suit against the appellant, to recover the value of a hog of the appellee killed by the appellant's cars, its railroad not being fenced.

The case originated before a justice of the peace, and though there is only twenty-five dollars involved the case is lawfully here.

The complaint alleged that "a locomotive owned and used by said defendant, on its railroad, in the county of Franklin, and State of Indiana, on, etc., struck, ran against and over, and killed one hog of the plaintiff," and that at the time and place of killing the road was not fenced. It is argued that this does not show that the animal was killed in Franklin county, or that the appellant committed the injury. We think that by such liberality of construction as pleadings before justices of the peace should receive, the complaint is sufficient in these particulars. It is also urged that the complaint should have averred that the road could properly have been fenced at that place; but we think that such an allegation would have been wholly unnecessary. Affirmative matter of defense comes from the defendant, and need not, and indeed should not, be anticipated by the complaint.

The evidence disclosed that at the place where the hog was killed the railroad was situated on the old tow-path of the White Water Valley Canal, on the south side of the canal, and that there was no fence on the north side of the railroad. The evidence did not expressly disclose whether the canal was in use for any purpose or not.

It might have been inferred from the evidence that as a thoroughfare it was abandoned—as is notorious. Railroads are not apt to occupy the tow-paths of canals in use as such. Then, was the appellant bound to fence at that place? We think so. The argument that the canal is a highway, and could not be lawfully obstructed by a fence, would do well enough in a proper case. But abandoned works of that character are probably not meant to be protected as highways. The verdict is right. The judgment is affirmed, with ten per cent. damage and cost.

In the Jeffersonville, Madison and Indianapolis Railroad Company vs. Dunlap, 29 Ind. 426.

Appeal from the Johnson Common Pleas.

FRAZIER, J.—This was a suit against the appellant for the killing of the appellee's horse by the cars of the appellant. The complaint was in two paragraphs. The first alleged that the railroad was not fenced "at the time when and place where" the horse was run over and killed. By the second paragraph, the right of action bottomed upon the negligence of the defendant's servants. The sheriff's return to the summons was as follows: "Served the within on James H. McClellan, Jeffersonville, Madison and Indianapolis Railroad Agent at Franklin, and Owen Frost, Jeffersonville Railroad Passenger Conductor, by reading to and in the hearing of the same." There was a motion overruled to set aside the return, for the following reasons: first, because it was insufficient; second, it should have been served by copy, on a conductor of a train passing through the county. The first of these objections was too general; it pointed out no particular objection to the return, and, therefore, rightly disregarded.

A different rule would sanction a practice tending to mere vexation, and hindering instead of aiding in the administration of justice. A blind motion, suggesting no definite ground of objection to the return, would put the court upon a general search, and operate as a trap. When, if the defect were pointed out,

it might be cured by speedy amendment by the officer, or if that could not be done, it is fair to suppose that the court would sustain the motion, and thus avoid any opportunity for the vexation and delay of an appeal to this court. Such questions, merely dilatory, and in no manner touching the merits of the controversy, are not favored by previous decisions of this court.

The second objection made to the sufficiency of the return is definite. But we think it was correctly overruled. The third section of the act of 1863, (p. 187) authorizes service, by copy, upon any conductor of a train passing through the county, in actions for killing or injuring animals upon railroads not securely fenced; but that statute does not require such service. It does not, therefore, render insufficient service upon any agent of the corporation, as authorized by the thirty-sixth section of the code, and by the act of March 4, 1853. Sess. Laws, 1853, p. 102, and Laws Spec. Sess., 1861, p. 78.

We do not overlook the fact that the return of service upon the station agent was defective, in not showing that the chief officer of the corporation was not found in the county. That objection was not made below, and is not made even here.

But there is still another reason why the motion to set aside the service upon the second ground should have been overruled. The second paragraph of the complaint was the ordinary action for negligence, and there is nothing in the act of 1863, relied upon by the appellant, which at all touches the subject of process in such case. The defendant pleaded, first, general denial; second, to the first paragraph of the complaint, that the horse was killed without any fault or negligence of the defendant, and because of gross negligence of the plaintiff. It is assigned for error, that the demurrer to this second paragraph was sustained.

The statute of 1863, already referred to, made the defendant liable, the road being unfenced, "without regard to the question whether such killing was the result of wilful misconduct or negligence, or the result of unavoidable accident." Sec. 5. Undoubtedly the misconduct and negligence of the railroad company is meant to be referred to by the statute. It was intended that the absence of a sufficient fence should have the effect to create a liability for the destruction or injury of animals by a railroad train that negligence or wilful misconduct in the management of the train would otherwise involve. And, indeed, the act of 1863 was passed in full view of repeated decisions of this court construing the act of 1853, which uses the language, as creating the liability, even though the plaintiff had been guilty of negligence contributing to produce the injury, by permitting the animal to wander upon the lands adjoining the track of the railroad. M. & I. R. R. Co. vs. Whiteneck, 8 Ind. 217; I. & C. R. R. Co. vs. Townsend, 10 Ind. 38; N., A. & S. R. R. Co. vs. Yelton, 12 Ind. 3; same vs. Maiden, Ind. 10; I. & C. R. R. Co. vs. Guard, 24 Ind. 222; same vs. McKinney, 24 Ind. 283. To this extent, at least, then, the act of 1863 must be held to go, and so far the question ought not longer to be deemed open to discussion here.

But in Knight, Adm'r, vs. The T. & W. R. R. Co., 24 Ind. 402, it was held that where the negligence of the plaintiff was so gross as to show a willingness that the animal should be killed, there could be no recovery, though the road was not fenced. So, very clearly, if the owner drives his animal upon the track, that it may be killed, or allows it to wander under such circumstances as justify the conclusion that he deserves that result, it cannot be supposed that the legis-

lature intended that the railroad company should be liable, on account of its failure to fence.

These would be cases of an exposure of the property, with the fraudulent intent to obtain its value by suit; and the courts are not at liberty to hold that by this statute the legislature meant to sanction such iniquity. The language employed indicates no such purpose.

The averment of the paragraph of the answer under examination is, that the horse "was killed by and on account of gross negligence of said plaintiff, and without any fault or negligence of said plaintiff, and without any fault or negligence of said defendant, its servants or employees."

It is argued that this general allegation of gross negligence is not sufficient; that it is but a conclusion; that the facts should have been stated, and The City of Buffalo v. Holloway, 3 Seld., 493, and Seymour v. Maddox, 16 Q. B., 326, are cited in support of the position. We think that those cases do not go to the point. The gravamen in each of those cases was, that by virtue of a contract it became the duty of the defendant to do certain things which he neglected to do, whereby the plaintiff was damaged. It did not appear, from the facts stated, that the duty was imposed, and it was merely held that the averment, that the duty existed, was alleging a conclusion of law, and not of fact

This was in accordance with a rule of pleading long and well settled. But was it a question of law, or a question of fact, or a mixed question whether gross negligence existed? If a question of fact, then the averment was the averment of fact to be proved, and to have alleged the particular circumstances justifying the conclusion might have violated that familiar rule of pleading which forbids alleging the evidence. This rule is, however, to be harmonized with another, viz., that a general statement of facts, which admits of almost any proof, is bad. 1 Chid. Pl. 232.

These rules define two extremes, both of which must be avoided. Regarding the averment as a conclusion of fact and not of law, has the pleader, in this instance, avoided the latter extreme? Is the allegation too general? The approved forms in the books of precedents seem to justify some generality in the averment of negligence, that is, the particular facts constituting negligence are not alleged.

So, among the forms made sufficient by our statute, number 14 is one for a complaint against the owner of a stage coach for injury to a passenger by the carelessness of the driver, in which the allegation is, "that the stage was upset by the carelessness of the driver, whereby," etc., from which it may, by liberality of construction, be understood that carelessness in driving was intended to be stated as the cause of the injury. So far as we are aware, all the forms, and certainly every rule of pleading which can be applied to the subject, while dispensing with the necessity of a prolix statement of the particulars constituting negligence, do require that the act which was characterized by negligence shall be stated.

What did the plaintiff in this case do with gross negligence? or what act did he so omit? The fact that the horse starved to death because he did not feed him, or persished in a swamp into which the plaintiff had driven him, or died because of reckless driving, or any other of the thousand modes by which gross carelessness may destroy an animal's life, without the intervention of any rail-

road, might be proved to sustain this paragraph of the answer quite as well as that the horse was blind and had been willingly exposed to collision with railroad trains, passing every hour, as in the case of Knight v. The Y. & W. R. R. Co., already cited. The pleading is so utterly uncertain and ambiguous that it cannot be told from it whether the pleader intended to deny the complaint or to confess and avoid it. If the former, then his proof was admissible under the general denial; if the latter, it should have so appeared upon its face by such allegations as would have shown (the killing of the horse by the cars being admitted) that the gross negligence of the plaintiff produced the fatal result. Even then it might be a question whether the facts would constitute a bar to the action. The question would then be whether gross negligence of the plaintiff, in exposing the horse to injury, is always sufficient to show a willingness or desire that injury may be inflicted.

But that question need not now be decided. The evidence of the plaintiff was not definite as to whether the animal was killed before or after the suit was begun. The animal was killed in the forenoon of the day that the suit was brought October 11th, acccording to one witness, while another thinks he was killed in September. It was not put in proof when the suit was commenced. The appellant thinks that a new trial should have been granted because the evidence did not show that the horse was killed before the commencement of the suit. There is nothing whatever in the point. That question was not in issue. Smith v. Holmes, 19 N. Y. 271.

The appellant attacks the first paragraph of the complaint because it does not allege that the railroad was not fenced at the place where the animal entered upon it. We need not pass upon the question of the sufficiency of this paragraph. The second paragraph was good, and the evidence was sufficient to support it in this court.

The judgment is affirmed, with ten per cent. damages and costs.

73. An act to provide compensation to owners of animals killed or injured by the cars, &c., of railroad companies. 1 R. S. (G. & H.) p. 522.

74. Summons in such case may be served on a conductor, &c. *Id.* 523. See Process.

75. Act not to apply to railroads securely fenced. *Ibid.* See Boundaries, p. 169; Fences, p. 437.

76. The act is in the nature of a police regulation, and constitutional. The N. A. & S. Railroad Co. vs. Felton, 12 Ind. 3, 20; *Id.* 38, 49, 502, 549; 12 *Id.* 560, 406, 478, 485; 16 Ind. 84. See Constitutional Law, p. 216, § 95. See 8 Ind. 217.

77. The act is for the benefit of the public, to guard against injuries to passengers, and companies cannot divest themselves of responsibility by making private contracts with the bondholders along the road, by which the latter agree to make and keep up fences. N. A. & S. Railroad Co. vs. Maiden, 12 Ind. 10; *Id.* 3.

78. The act of 1859 is prospective, only in its operation, and hence only applies to animals killed or injured after the passage of the law. The Indianapolis, &c., Railroad Co. vs. Kercheval, 16 Ind. 84.

79. *Notice.*—The act of March 1, 1853, (acts 1853, p. 113,) which provides that in actions for compensation for animals killed or injured by cars, locomo-

tives, or carriages of any railroad company in this State, the justice of the peace before whom such action is prosecuted, "shall cause at least ten days notice to be served on the railroad company defendant by service of summons by copy on any conductor of any train passing through said county," is confined to actions against the corporation; such service of process will not, when there is no appearance, authorize a judgment against individuals, although they may represent themselves to be lessees, and to have charge of the rolling stock of the road. Write vs. Gossett, 15 Ind. 119. See process.

80. The act of 1853 does not apply to actions commenced in courts of common pleas and circuit courts, but only to such as are brought in justices courts. The Evansville, &c., Co. vs. Hibbard, 14 *Id.* 509. But by the amendatory act of 1859, p. 105. where the damages exceed fifty dollars, the party may bring his suit in the circuit or common pleas court, and recover the value of the animal killed.

The Indianapolis, &c., Co. vs. Kercheval, 16 Ind. 84.

81. A suit brought in the common pleas against a railroad company for killing cattle, is not governed by the statute of 1853, but by the common law rules. The Jeffersonville Railroad Co. vs. Marion, 10 Ind. 416; 11 *Id.* 365, 458. Hence, the complaint must charge negligence, unskilfulness, or wilful misconduct on the part of the company or their agents, and that such negligence, &c., was the proximate cause of the injury. *Ibid.*

82. On appeal to the circuit court from a judgment by a justice of the peace, against a railroad company for killing stock, a judgment for double damages and a docket fee, under § 3 of the act of March 1, 1853, is erroneous. The Indiana, &c., Railway Co. vs. Gapen, 10 Ind. 292; *Id.* 182; The Jeffersonville Railroad Co. vs. Daugherty, *Id.* 549: 11 Ind. 375.

83. Under the act of March 1, 1853, though the owner of the animal be not an adjoining proprietor, and be guilty of negligence in permitting it to stray upon land adjoining the road, he may recover, if the company has failed to comply with the requirement of the statute. The Indianapolis, &c., Railroad Co. vs. Townsend, 10 Ind. 38; The Jeffersonville Railroad Co. vs. Applegate, *Id.* 49; The Indianapolis, &c., Railroad Co. vs. Meek, *Id.* 502; The Jeffersonville Railroad Co. vs. Daugherty, *Id.* 549; 12 Ind. 560, 406, 478, 485.

84. But should a person voluntarily place his animal upon the track, it seems he could not recover, but might, perhaps, be regarded as having abandoned his property. 10 Ind. 38.

85. Under the act of March 1, 1853, the owner, though he may be passively a wrong-doer, by suffering his animal to run at large, may yet recover. N. A. & S. Railroad Co. vs. Maiden, 12 Ind. 10; Hart vs. Indianapolis & Cincinnati Railroad Co., 12 Ind, 478; *Id.* 552; 13 *Id.* 258; *Id.* 373

86. An act was passed on the 11th of May, 1852, providing that when any animal should be killed or injured by any vehicle run upon a railroad in this State, the owner might recover for his loss in a suit against the company, without proof of negligence, where the injury occurred upon a part of the road left by the company unfenced. The act did not designate any tribunal in which the remedy should be sought. On the 1st of March, 1853, another act was passed authorizing the prosecution in such cases to be instituted before a justice of the peace, and prescribing the mode of proceeding. The second section enacted

that on the hearing of the cause, the justice or jury trying the same should give judgment for the plaintiff for the value of the animal destroyed or injury inflicted, without regard to the question whether the injury or destruction was the result of willful misconduct or negligence, or of unavoidable accident. The latter act expressly repealed the former, saving, however, pending suits.

Held, that the acts were in *pari materia*, were enacted to effect the same object, and were to be construed together.

Held, also, that under each of them, railroad companies, whose roads were not fenced, were liable for the value of all stock straying without the owner's fault from adjoining land, killed or injured by the cars or locomotives, without regard to the question of negligence, misconduct, or inevitable accident. Williams v. The New Albany, etc., R. R. Co., 5 Ind., 111; The Lafayette, etc., R. R. Co., v. Shriner, 6 Ind., 141.

87. There is nothing peculiar in the character of the Indianapolis and Cinnati Railroad Company which would prevent the legislature from requiring her to pay for the killing of animals upon her road, in default of keeping it fenced. The Indianapolis, etc., R. R. C., v. Kercheval, 16 Ind. 84.

88. The cost of making and keeping the fence in repair, or the amount paid in the way of damages for stock killed, does not "detract from or effect the profits of the corporation," in the sense intended by her charter. *Ibid.*

89. *Query?* Whether a railroad company can be compelled to maintain one-half of a partition fence separating its roadway from an adjoining farm. The Evansville, &c., Co. vs. Fitzpatrick, 10 Ind. 120.

90. *Where owner must maintain fences.*—Where the owner of land through which a railroad runs has received from the company, in the assessment of damages, an agreed compensation for erecting and maintaining fences between the road and his land, and fails to maintain such fences, he cannot, if by reason of such failure an animal is killed by the cars of the company, recover for the same without proof of negligence. Terre Haute, &c., Railroad Co. vs. Smith, 16 Ind. 102.

91. *Cattle Pits.*—The statute does not expressly require the construction of cattle pits at road crossings, but perhaps they may be fairly embraced under the general term, fence. The N. A. & S. Railroad Co. vs. Pace, 13 Ind, 411.

92. A railroad company, after having obtained the right of way for its road, is entitled to the exclusive possession of such way and stands to adjoining proprietors, (where no statute has changed the relation) in the common relations existing between proprietors of land bordering on each other; and such proprietors, at common law, are not bound to fence against each other, but each is bound to keep his stock upon his own land. Williams vs. The New Albany and Salem Railroad Co., 5 Ind. 111.

93. Suit against a railroad company to recover for cattle killed by their engines. The right to recover rested on the following facts: Near where the stock was killed was a small brook, over which the company had built a culvert. Below the culvert the plaintiff had a pasture in which he kept his cattle. Across the brook, below the culvert, be had made a fence of long poles. A flood came and floated driftwood through the culvert against the fence. To prevent the accumulation of drift above the culvert in such quantities to endanger its safety, the company aided in its passage. At sunset, the plaintiff

knew the exposed situation of his fence, but would not remove his cattle. At night, the fence being borne away, the cattle passed upon the road and were killed. *Held*, that the plaintiff could not recover. The I. & C. Railroad Co. vs. Wright, 13 Ind. 213. See 16 Ind. 102.

94. A railroad company will not be compelled, by the act of March 1, 1853, to pay for stock running at large, killed, or injured at a place on their road where a fence ought not to be erected. The open space in front of a mill, necessary for the convenience of shipment, is such a place. Proof that the killing or injuring occurred at or near the mill, brings the case *prima facie* within this rule, and puts it upon the plaintiff to show that it occurred at a place where a fence would not be improper. I & C. Railroad Co. vs. Kinney, 8 Ind. 402; 9 *Id.* 397. See 6 Ind. 141.

95. In a suit against a railroad company to recover damages for stock killed by their cars, at a point on their road where a highway had been established, which highway, though shown to have been abandoned by the public for two years, was not shown to have been vacated, the plaintiff must prove misconduct or negligence on the part of the company or their agents. Indiana, &c., Co. v. Gapen, 10 Ind. 292.

96. In a suit against a railroad to recover for stock killed, the allegation that the road was not fenced is a material one, must be proved where such a fact is an element in the right to recover. The I. & C. Railroad Co. vs. Wharton, 13 Ind. 509; 14 Ind. 30; 15 *Id.* 486; 16 Ind. 435.

97. *Speed.*—The law requires that a train of cars, in passing through a town, shall be run with a greater degree of care, and hence at a less rate of speed than is generally observed in the movement of the train. The Lafayette, &c., Co, vs. Shriner, 6 Ind. 141.

98. If an animal is wrongfully on the track of a railroad, but is injured while on the same, by the gross negligence or willful misconduct of the company's agents, the company is liable. *Ibid.* See *Animals.*

99. The simple killing of an animal by the cars of a railroad company is not *prima facie* evidence of negligence on the part of their employees. The Indianapolis, etc., R. R. Co. v. Means, 14 Ind., 30.

100. It is no defence to an action for killing a horse by a railroad company, if the horse was wantonly killed, that it occurred at a point where the road was properly fenced; nor that the company had paid the owner of the land on which it was killed for fencing the road as a part of the consideration for the right of way through his farm. N. A. & S. R. R. Co. v. McNamara, 11 Ind. 543.

101. *Fright.*—A railroad company is not liable, under the statute of 1853, for an injury to stock resulting from fright at their cars, where the animal was not touched by any car, locomotive, or other carriage belonging to the company. Peru, etc., R. R. Co. v. Hasket, 10 Ind., 409.

102. *Freight Trains.*—The statute awarding damages to the owners of animals killed or injured by the rolling stock of any railroad company applies to animals killed by freight as well as passenger trains. The I. & C. R. R. Co. v. Smelling, 16 Ind., 435.

103. Suit for the value of animals killed by the cars of a railroad company. The evidence showed that the animals were killed between two named geographical points, and upon same railroad, by the rolling stock thereof, but did

not show, in terms, that they were killed in Shelby county, nor by the railroad company, defendant.

Held, that as the court below knew judicially the boundaries of the county, it will be presumed that the first point was correctly determined. Indianapolis, etc., R. R. Co. v. Moore, 16 Ind., 43.

104. In a suit against a railroad company for damages for injuring cattle, the witnesses estimated the value of the property variously from thirty to forty dollars.

Held, that the court might find the value to be thirty-seven dollars. Madison, etc., R. R. Co. v. Herod, 10 Ind., 2.

120. To provide compensation to the owners of animals killed, etc. Act March 4, 1863, p. 25.

121. The provisions of the act of March 4, 1863, (Acts 1863, p. 25), for the enforcement of judgments against railroad companies for stock killed, are not repugnant to sections 22 and 23 of article 4 of the constitution. The Toledo, etc., R. R. Co. v. Nordyke, 27 Ind., 95.

122. The statute requiring railroads to be kept fenced is not intended to change the common law rule as to the duty of the owner of cattle, nor merely to give them compensation for animals killed or injured on the track where the road is not fenced, but chiefly as a police regulation for the benefit of the public, to secure safety and freedom from obstructions to the passage of carriages along the track. The Toledo, etc., R. R. Co. v. Fowler, 22 Ind., 316.

123. *Same.*—Where a railroad company has caused its road to be securely fenced, and has exercised reasonable care and vigilance to keep it so, and the fence is thrown down and left down by third persons, without the authority or knowledge of the company, whereby cattle stray upon the track and get killed or injured before the company has notice, the company is without fault and not liable for the stock thus killed or injured. *Ibid.*

124. The statute upon the subject of the liability of railroads for stock killed, where the road is not fenced, gives to the want of a proper fence the same effect that negligence in the management of the train would otherwise involve. The act of 1863, upon this subject, having been passed in view of the decisions of this court, that the liability under the statute of 1853, upon the same subject, extended to cases where the negligence of the owner contributed to the injury, by permitting the animal to wander upon the lands adjoining the track, the new act must be construed in the same way. The Jeffersonville, etc., R. R. Co. vs. Dunlap, 29 Ind. 426; Madison, etc., R. R. Co. vs. Whiteneck, 8 Ind. 217; Indianapolis, etc., R. R. Co. vs. Townsend, 10 Ind. 38; New Albany, etc., R. R. Co. vs. Yelton, 12 Ind. 3; the same vs. Maiden, 12 Ind. 10; Indianapolis, etc., R. R. Co. vs. Guard, 24 Ind. 222; the same vs. McKinney, Ind. 283.

125. *Same.*—But if the conduct of the owner is of such a character as to justify the belief that he desired the injury to happen, the railroad company will not be liable, though the road is not fenced. The Jeffersonville, etc., R. R. Co. vs., Dunlap, 29 Ind. 426; 24 Ind. 402.

126. Where a railroad is not securely fenced, the company is liable for stock killed by its cars without reference to the question of negligence (1 G. & H. 522), although the road is at the time operated by a receiver duly appointed by

a competent court. McKinney vs. The Ohio, etc., R. R. Co., 22 Ind. 99; 20 Ind. 498.

127. By statute, in this State (1 G. & H. 342), railroad companies are liable for animals, but not persons, injured upon their roads, where they might be but are not fenced, irrespective of the question of negligence. Thayer vs. The St. Louis, etc., R. R. Co., 22 Ind. 26.

128. But where a proper fence is maintained, and in places where it is not required to be, they are not liable for animals injured except as to common law, where there is negligence on their part, and the negligence of the owner of the stock does not contribute to its immediate injury. *Ibid.* See 18 Ind. 215.

129. *Statute Construed.*—The act to provide compensation to the owners of animals killed or injured by the cars (acts 1863, p. 25), does not apply when the killing or injury occurs at a point at which the road cannot be legally fenced in. The Jeffersonville, etc., R. R. Co. vs. Brevoort, 30 Ind. 324.

130. *Same.*—The fact that the company is not bound to fence at the place where the killing or injury occurs is purely a matter of defense, and need not be negotiated in the complaint. *Ibid,*

131. A railroad company is not required to fence her track in the immediate vicinity of her engine house, machine shops, car house, and wood yard, and the company is therefore not liable for stock killed by her in such places. The Indianapolis, etc., R. R. Co. vs. Orstel, 20 Ind. 231.

132. *Same.—Cities.*—The statute does not apply to injuries done at points where it would be illegal or improper for the railroad company to maintain fences, such as road and street crossings, etc. It is not every place however, within the corporate limits of a town or city that is within the exceptions, but only such as it would be improper to fence. The Indianapolis, etc., R. R. Co. vs. Parker, 29 Ind. 471; The Lafayette, etc., R. R. Co. vs. Shriner, 6 Ind. 141; The Indianapolis, etc., R. R. Co. vs. Kenney, 8 Ind. 402; the same vs. Orstel, 20 Ind. 231; the same vs. Irish, 26 Ind. 268.

133. *Highways.*—Railroad companies are required by statute to fence their roads; and, construing this law as a police regulation for the safety of the public, the fact that a railroad runs alongside of a public highway would seem to require peculiar care on the part of the company in complying with the law. Indianapolis R. R. Co. vs. Guard, 24 Ind 222; *Id.* 283; 8 *Id.* 217; 10 *Id.* 38; 12 *Id.* 3. See 24 *Id.* 283.

134. A railroad company may lawfully fence across a private way, maintained by the owner of the land for his own use; and failing to do so, is liable for killing stock at such a crossing. This would not be so in case of a private way established under the statute for the use of the lands of another. The Indianapolis, etc., R. R. Co. vs. Lowe, 29 Ind. 545; 18 *Id.* 173.

135. The duty of placing suitable cattle pits at the crossings of highways, etc., results from the requirement that a railroad shall be "securely fenced," if the company would avoid liability for animals killed. And when the usual and ordinary cattle pit has been constructed, as near the highway as can conveniently be done, the company is not liable, without proof of negligence, for an injury happening to an animal between the highway and the pit. The Indianapolis, etc., R. R. Co. vs. Irish, 26 Ind. 268; 28 *Id.* 479.

136. *Draw Bars.*—Where a railroad company has securely fenced their

road, except at certain places where the owner of the land is permitted to erect draw bars or gates for his own convenience in crossing said road, and by reason of the neglect of such land owner to maintain such bars or gates, his stock passes upon the railroad track and is killed, the company are not liable for the damages sustained. The Indianapolis, etc., R. R. Co. vs. Shirner, 17 Ind. 295.

137. The object of the statute providing compensation for animals killed or injured by the cars, etc., of railroad companies, is the protection of the public, and not simply to compensate the owners of the animals; and the fact that the owner of the land has for a long period, without any contract to that effect, maintained a sufficient fence, does not, so far as the public is concerned, relieve the company from the duty imposed by the statute. While the fence is so maintained, the company is not liable to the penalty provided by law; but that penalty is incurred whenever the failure to maintain the fence as required may happen. The Jeffersonville, etc., R. R. Co. vs. Nichols, 30 Ind. 321.

138. The want of reasonable time to repair the fence would excuse the company; but the allegation, in an answer by the company, that the fence was out of repair but a short time, is too indefinite. *Ib.*

139. The liability imposed by the statute upon railroad companies for injuries to animals, without proof of negligence, where the roads are not fenced, is in the nature of a police regulation for the safety of passengers, and applies as well to companies organized under special charters as to those organized under the general law. The Indianapolis, etc., R. R. Co. vs. Marshall, 27 Ind. 300.

140. The liability extends to all kinds of animals that would be kept from the track by an ordinary fence, without reference to the question whether they are large enough to throw a train off the track when run over by it. *Ib.* See 29 Ind. 471.

141. A railroad company is not liable for an animal killed on the track at a point where the company was not bound to fence, unless it was killed by the gross negligence or willful misconduct of the company's agents. The Indianapolis, etc., R. R. Co. vs. McClure, 26 Ind. 370. See Negligence.

142. Where animals are killed by the trains of another corporation, running in its own name and in its own behalf, and under its own control, over a part of the track of the defendant, the owner of the road, under a contract for that purpose between the two corporations, the company owning the road is liable under the statute. The Indianapolis, etc., R. R. Co. vs. Solomon, 23 Ind. 534.

143. The owner of a blind horse turned him out upon the common of a town through which a railroad ran, where he was killed by a passing train. The injury did not occur on any street or alley, and the track was not fenced: *Held*, that the owner was guilty of gross negligence, amounting to a willingness to suffer the injury complained of, and hence he cannot recover. Knight, Adm'r of McRachan, vs. The Toledo, etc., R. R. Co., 24 Ind. 402.

144. The owner of an animal killed or injured by the cars of a railroad company may recover therefor, if the road is not fenced, though he be not an adjoining proprietor, and has been guilty of negligence in permitting the animal to stray upon the railroad. The Indianapolis, etc., R. R. Co. vs. McKinney, 24 Ind. 283.

145. A railroad company is only required to make and keep up a legal fence,

such an one as good husbandmen generally keep. The Toledo, etc., R. R. Co. v. Thomas, 18 Ind. 215.

146. Where by reason of the owner of the animals injured, who was a conterminous proprietor, having failed to make the fence according to contract with the railroad company, they got upon the road, he cannot recover; Terre Haute, etc., R. R. Co. v. Smith, 16 Ind. 102. Nor his tenants as to gates or bars at private farm crossings; Indianapolis, etc., R. R. Co. v. Shriner, 17 Ind. 295; Cincinnati, etc., R. R. Co. v. Waterson, 4 Ohio St. 424. Nor a third person trespassing upon the lands adjoining such gates or bars; Indianapolis, etc., R. R. Co. v. Adkins, 23 Ind., 340. Nor if the injury occurred where the road ought not to be fenced, as at a mill yard; Indianapolis, etc., R. R. Co. v. Kinney, 8 Ind. 402. Or a street crossing; Lafayette, etc., R. R. Co. v. Shriner, 6 Ind. 141; The Bellefontaine R. R. Co. v. Suman, 29 Ind. 40.

147. Where, by contract with a railroad company, the owners of the land through which the road passes has undertaken to maintain the fence, no recovery can be had by him against the company for injury to his animals, which resulted from his failure to perform the contract. The Indianapolis, etc., R. R. Co. v. Petty, 25 Ind. 413.

148. The tenant of the land owner, thus bound by contract to maintain the fence, or a person whose animals tresspass upon the land, is in no better position to maintain an action than the proprietor. *Ibid.* The Indianapolis, etc. R. R. Co. v. Adkins, 23 Ind. 340; The Indianapolis, etc., R. R. Co., v. Shriner, 17 Ind. 295.

149. *Services of Process On.*—The law of 1861, (special session, p. 78), which required fifteen days service of process upon railroads, where the principal office of the company was without the State, is repealed by the act of 1863. (Acts 1863, p. 25). The Toledo, etc., R. R. Co. Shurely, 26 Ind. 181.

150. *Same.*—In actions against railroads for the killing of stock by their trains, the summons may, under sec. 2 of the act of 1863 (Acts 1863, p. 187) be served upon a conductor, but the statute does not require such service, and service upon an agent of the corporation, as authorized by sec. 36 of the code, or by the act of March 4, 1853, is good. The Jeffersonville, &c, R. R. Co. vs. Dunlap, 29 Ind. 426.

151. *Service.*—Such against the railroad company, before a justice of the peace for killing stock. The summons was served ten days before the return day, on a conductor. On the return day the defendant specially appeared and brought to the knowledge of the justice, by affidavits, the fact that the principal office of the railroad company was not in this State, and thereupon moved to set aside the process and service as insufficient, and dismiss the cause. This motion was overruled; and, on motion of the plaintiff, the justice continued the cause and fixed a time for trial twenty-eight days thereafter. Defendant made default at the trial, appealed to the circuit court, and renewed his motion, which was again overruled. Held, that this question was decided against the appellant in the case of the Michigan Southern, &c., R. R. Co. vs. Shannon, 13 Ind. 171, and reaffirmed in the case of the Ohio, etc., R. R. Co. vs. Quier, 16 Ind. 440, to which rulings the court adheres. *Held*, also, that the continuance of the cause was sufficient notice to the defendant. The Toledo, etc., R. R. Co. vs. Talbert, 23 Ind. 438.

152. *Jurisdiction.*—Actions against railroad companies for injuries to animals, must, under the statute, be brought in the county where the injury was done, and in the absence of proof upon this subject, the jurisdiction of the court over the subject-matter of the case is not made to appear. The Indianapolis, etc., R. R. Co. vs. Renner, 17 Ind. 135.

153. Two or more causes of action cannot be united in the same suit for the purpose of giving the circuit court or common pleas court jurisdiction, which is wanting when the value of the animal or animals killed, or the injury done, at the same time, does not exceed fifty dollars. The Jeffersonville, etc., R. R. Co. vs. Brevoort, 30 Ind. 324; 20 Ind. 430; 24 Ind. 139; 27 Ind. 71; 30 Ind. 342.

154. A cow and heifer, together worth one hundred and ten dollars, standing at the same time, a few feet apart, upon a railroad track, were killed by a passing train. The value of the heifer did not exceed fifty dollars. *Held*, that they constituted one cause of action, of which the common pleas court had jurisdiction. The Lafayette, etc., R. R. Co. vs. Ehman, 30 Ind. 83.

155. A complaint for stock killed by a railroad, before the act of 1859, must show that the animals sued for were killed through the railroad company and without the immediate fault of the plaintiff. Wright vs. The Indianapolis, etc., R. R. Co., 18 Ind. 168; 19 Ind. 42.

156. In an action, before a justice, to recover the value of cattle killed by a railroad company, the complaint should aver that they were in the county, and before the plaintiff can recover, his proof must establish the fact. The Indianapolis, etc., R. R. Co. vs. Wilsey, 20 Ind. 239.

157. In a complaint to recover of a railroad company the value of animals killed by its cars, it is not sufficient to aver, generally, that the road was not securely fenced in, etc., without connecting the want of such fence.

PROMISSORY NOTES.

No. 1.

May —, 187–.

One day after date, for value received, I promise to pay John Smith five hundred dollars, waiving valuation and appraisement laws, with interest at ten per cent, from date.

JOHN DOE.

No. 2.

One year after date, for value received, I promise to pay John Smith fifty dollars, waiving valuation and appraisement laws, with interest at ten per cent., after maturity.

JOHN DOE.

No. 3.

Six months after date for value received, I promise to pay James Short fifty dollars, waiving valuation and appraisement laws with interest from date. JOHN SMITH.

No. 4.

June ——, 1873.

Due James Smith fifty dollars, waiving valuation and appraisment laws. RICHARD ROE.

No. 5.

$—— June 30, 1873.

One day after date, we promise to pay John Hunt one hundred dollars value received, waiving valuation and appraisement laws. If this note is not paid at maturity, the undersigned agree to pay expenses of collection including attorneys fees. SMITH HAYS.
JOHN SHORT.

No. 6.

June 10, 1873.

One day after date, for value received, I promise to pay John Smith, at the first national bank of Newport, five hundred cents, value received, waiving valuation and appraisement laws, interest at ten per cent.

SAM NASBY.

BILL OF EXCHANGE OR ORDERS.

No. 1.

NEWPORT, Ind., June 1, 1873.

Two months after sight pay James Smith five dollars. To Joe Rigler. SAM POLL.

No. 2.

June 30, 1873.

Mr. Thomas Lovegood please pay Seth Thomas five dollars, and charge the same to me.

HUGH LONGSTREET.

ORDER FOR GOODS.

January 27, 1872.

Mr. Thomas Guliver:—Please let Henry Short have such goods as he may select from your store, not to exceed five dollars worth, and charge the same to my account.

JOHN W. BOLINBROKE.

RECEIPT.

[No. 1.]

Received, Newport, Indiana, June 2, 1873, of Smith Hamilton, Five Hundred Dollars in full of all accounts to this date. HUGH COOK.

[No. 2.]

Received, January, 2, 1873, of Jo. Bigler, administrator of the estate of John Pogram, deceased, Five Dollars, in full of my account against said estate.

JAMES PENYBECKER.

FORM FOR MINUTES FOR A MEETING OF THE CITIZENS FOR SOME PUBLIC PURPOSE.

School House No. 8, Vermillion Township,
Vermillion county, Ind., July 2, 1873.

The citizens of school district No. 8 met at the above mentioned time and place for the purpose of organizing a debating society. On motion Henry Shoe was called to the chair, and Seth Smith was chosen Secretary. On motion, a committee of three was appointed by the chair to draft a constitution and by-laws for the government of this club; the committee consisted of A, B and C. On motion a committee was instructed to report at next meeting. There being no further business, on motion, the meeting adjourned to meet on Saturday night, July 10, 1873.

HENRY SHOE, Pres't.

SETH SMITH, Secretary.

AN AGREEMENT.

This article of agreement made and entered into on this 4th day of June, 1873, between John Smith and Henry Long. The said John Smith doth hereby covenant and agree with the said Henry Long as follows. He, the said John Smith, does hereby agree to let the said Henry Long have the use of his farm, situated in Vermillion county Indiana, described as follows: South-west quarter of section 19, township 17 north, range 10 west, 160 acres, for the term of one year from this date. The said Henry Long is to deliver to him one-half of all the crops raised on said farm; the wheat to be delivered in the stack, and the corn in the crib, on said farm.

Henry Long covenants and agrees with the said John Smith to take said farm, and to pay the rent above specified, and to farm the land in a good, husband-like manner; that he will do no unnecessary damage to the house or or-

chard on said land, and that he will at the end of one year from this date surrender up to the said John Smith the farm aforesaid.

JOHN SMITH.
HENRY LONG.

CHATTLE MORTGAGE.

In consideration of one hundred dollars to me in hand paid by Fred. Ray, I have this day bargained and sold unto the said Fred. Ray the following goods and chattels: One bay mare, five years old; one black milch cow, with white face, three years old. Provided always, and these presents are upon this condition: that whereas, I am indebted to the said Fred Ray in the sum of one hundred dollars, evidenced by a promissory note bearing even date herewith, the same being payable December 25th, 1873, of which the following is a true copy: (Here give full copy of note.) Now, if I shall pay said note when the same shall become due, then this sale and conveyance to be void, otherwise to be in full force. Then I am to retain possession of said property until said debt becomes due, and upon default of payment of said money, I am to redeliver said property to the said Fred. Ray, June 10, 1873.

THOMAS NASBY

STATE OF INDIANA, }
County of Vermillion. } ss.

Personally came before me, J. A., Justice of the Peace in and for said county, Thomas Nasby, and acknowledged the execution of the above mortgage, in witness whereof I have hereunto set my hand and seal, this June 10, 1873.

J. A. Justice of the Peace.

This mortgage must be recorded in ten days or it is void. 1 Res. G. & H. p. 352.

WARRANTY DEED.

[No. 1.]

A. B. conveys and warrants to John Jones the following land situated in Vermillion county, Indiana, to-wit: The

northeast quarter of section ten, township sixteen north, range 9 west, one hundred and sixty acres, for the sum of ten thousand dollars.

In witness whereof the said A. B. has hereunto set his hand and seal, this 10th day of May, A. D., 1873.

A. B. [Seal.]

STATE OF INDIANA, }
Vermillion County. } ss:

Before me, R. E. S., Recorder in and for said county and State aforesaid, personally comes A. B. and acknowledged the execution of the above deed. In witness whereof I have hereunto set my hand and affixed my official seal, this 10th day of May, 1873.

[Seal.] R. E. S., Recorder.

If a deed is by a husband and his wife, say A. B. and C.B., his wife, convey, etc.

All deeds should be recorded in ninety days from the time of execution.

QUIT CLAIM DEED.

[No. 2.]

A. B., and C. B., his wife, quit-claims to John Smith the following lands, situated in Vermillion county, Indiana, to-wit: The south-east quarter of the south-west quarter, section 8, township 17 north, range 10 west, 40 acres, for the sum of seven hundred dollars.

In testimony whereof the said A. B. and C. B., his wife, have hereunto set their hands and seals, this April 9, 1873.

A. B. [SEAL.]
C. B. [SEAL.]

This must be acknowledged, like No. 1.

MORTGAGE OF LAND.

A. B. and C. B., his wife, mortgage and warrant to John Smith the following described premises, situated in Vermillion county, Indiana, to-wit: The south-east quarter of the south-west quarter, section 8, township 17 north, range 10 west, forty acres, to secure the payment of [here give a copy of note or account, &c.]

In testimony whereof the said A. B. and C. D. have hereunto set their hands and seals, this 9th day of April, 1873.

A. B. [SEAL.]
C. D. [SEAL.]

All mortgages must be acknowledged before some person authorized by law to take the acknowledgment of the same.

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